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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

**In the Matter of: Robert Scrivener, d/b/a
AA Electric Co.**

Case No.: 17-CA-3519

Date

3.21.68	Charge filed
5.13.68	Amended charge filed
5.17.68	Complaint & notice of hearing, dated
5.27.68	Respondent's answer, received
5.27.68	Respondent's motion to make more definite and certain, received
5.28.68	General Counsel's opposition to Respondent's motion, dated
6.10.68	Trial Examiner's order denying motion to make definite & certain and to dismiss, dated
6.25.68	Hearing opened
6.26.68	Hearing closed
8.15.68	General Counsel's motion to correct the record, dated
8.19.68	Charging Party's motion to correct the transcript, received
10. 2.68	Trial Examiner's Order correcting transcript, dated
10.30.68	Trial Examiner John M. Dyer's Decision, issued
12. 5.68	Respondent's exceptions, received
6.30.69	Decision and Order issued by the National Labor Relations Board, dated
7.22.69	Charging Party's motion to reconsider Board's Decision and Order, received
7.22.69	Respondent's motion to reconsider Board's Decision and Order, received

Date

- 8.19.69 Board's Order denying motions, dated
- 5.20.70 Board's application for enforcement, filed
- 1. 6.71 The Decision of the Court of Appeals for the Eighth Circuit
- 1. 6.71 The Judgment of the Eighth Circuit, entered
- 2.26.71 The Eighth Circuit's order denying the Board's Petition for Rehearing
- 10.12.71 The Order of the Supreme Court granting certiorari, dated

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

City Council Room, City Hall,
Springfield, Missouri,
Tuesday, June 25, 1968.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

JOHN M. DYER, Trial Examiner.

APPEARANCES:

JAMES G. WALSH, JR. Room 610, 601 East Twelfth Street, Kansas City, Missouri, appearing as Counsel for General Counsel.

DONALD W. JONES 110 Landmark Building, Springfield, Missouri, appearing on behalf of Robert Scrivener, d/b/a AA Electric Co., Respondent.

BENJAMIN J. FRANCKA Attorney, 714 Woodruff Building, Springfield, Missouri, 65805, appearing on behalf of Local 453, International Brotherhood of Electric Workers, A.F.L.-C.I.O., Charging Party.

JACK MOORE

Business Manager, Local 453,
International Brotherhood of
Electric Workers, A.F.L.-
C.I.O., 408½ West Walnut,
Springfield, Missouri.

RAY EDWARDS

Assistant Business Manager,
Local 453, International Broth-
erhood of Electric Workers,
A.F.L.-C.I.O., 408½ West Wal-
nut, Springfield, Missouri.

PROCEEDINGS

[6] **MR. JONES:** Your Honor, I did not bring copies and I do not have them at this time but I will get them later. In order to make the statement or to show that we deny the charges, I would like to insert these letters from me to the Regional Director to show that we deny the charges and deny jurisdiction of the Board at the earliest opportunity. Should we have them marked here?

TRIAL EXAMINER: Why don't you.

(The documents above referred to were marked Respondent's Exhibits Nos. 1 and 2 for identification.)

MR. JONES: So I believe it can be stipulated that Respondent's Exhibits Nos. 1 and 2 is a letter dated March 22, 1968, by me to the Regional Director with a copy of the letter to the employees.

MR. WALSH: General Counsel does not object to the March 22 covering letter to show that the charges were denied and I agree that the attachment, namely, Respondent's Exhibit No. 2 is a book letter that was sent to all the employees shown thereon. Let us merely get the facts contained in the documents.

MR. JONES: And Respondent's No. 3 is a letter dated May 15 from myself to Robert Allen denying the amended charge.

(The document above-referred to was marked Respondent's Exhibit No. 3 for identification.)

TRIAL EXAMINER: Are there any objections to Respondent's Exhibits Nos. 1, 2 and 3?

MR. WALSH: I have no objections on the grounds that I so stated.

TRIAL EXAMINER: All right. If there are no objections, they will be received.

[10] JACK MOORE,

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated and give us your full name and address please.

THE WITNESS: Jack Moore, 408½ West Walnut, Springfield, Missouri.

DIRECT EXAMINATION

Q. (By Mr. Walsh) What is your business, Mr. Moore?

A. I am business manager of the Electric Workers Local 453.

Q. That is the charging party in this case?

A. Yes, sir.

Q. What are your duties in connection with that position?

A. To organize the unorganized, to bargain collectively for the people I represent, to handle grievances as submitted.

[11] MR. JONES: Excuse me just a minute.

I would like to invoke the rule of the witnesses to require all witnesses to remain outside the room except the parties interested in the proceedings.

TRIAL EXAMINER: Let's go off the record for a moment.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

In an off-the-record discussion I have informed counsel for the respondent that under the way the rule has been construed for many years in many Board proceedings persons who are alleged as 8(a)(3) discharges are allowed to remain since they are parties to the proceedings and that I am informed by counsel for the General Counsel that the witnesses who are in the room are all alleged as 8(a)(3).

MR. JONES: Your Honor, I would like to make a record on this that I think it is unfair to leave these men in the room at this time because I think there is no substantial basis to the 8(a)(3) allegations and I think that if this is permitted in this case I do not see what would prevent in future cases a mere allegation of 8(a)(3) in order to have court invoking of the rule on behalf of respondent company.

TRIAL EXAMINER: I think that would be a rather far fetched idea for any Regional Director to ever allege or for any party to ever charge persons as 8(a)(3)'s in order to escape invocation of the rule. I think that is a far cry, Mr. Jones.

[12] MR. JONES: I just wanted to make the record on that.

TRIAL EXAMINER: All right. While we are talking about various points, let me make this statement. Invocation of the rule has to do with credibility and I am the one who is to resolve credibility. In resolving credibility I am also going on leading questions. If you ask any leading questions of your witnesses, you are debilitating them in my mind. I understand that more than usual parties do ask leading questions on preliminary matters in order to move quickly. When you get the hard core matters in issue, if you ask leading questions, at that point you are damaging your witness. You are making him hard for me to believe.

Now, this goes with other various things I have said as well. For instance, in conversation a threat is alleged if when you put on your witness, Mr. Jones, you say, did you make the following threat and you lay it out for him, you are not helping me to believe him. It is the same if on rebuttal you or Mr. Walsh were to say, "Did you say the following thing?" And allege what the witness said. You would be destroying your witness.

Try to help me resolve credibility by letting the witness's memory serve best. All right.

I will take your objections to leading questions but a leading question is something that you cannot retract.

MR. WALSH: Now, you refer to these 8(a)(3) alleged discriminatees. Under 8(a)(4) it would be the same principle?

TRIAL EXAMINER: It would be the same principle.

[14] Q. Mr. Moore, did there ever come a time when you had any contacts with any of your employees, excuse me, with the employees of AA Electric Co.?

A. Yes, sir.

Q. Will you describe the circumstances for us please? How did this contact begin and what came of it?

A. On Sunday evening, I believe it was March 17, Bill Cockrum who was working for AA Electric Co. called me and asked me a couple of questions about if the employees of Mr. Scriveher wanted to join the I.B.E.W. would we take them as members of our organization.

I told him that we would if they passed examinations which were set up in our by-laws. He said that he would like to have a meeting with us the next day and that he had already set up this meeting with Mr. Edwards and wanted to know if that meeting would still stand and I told him yes and at that point I had not talked to Mr. Edwards. I did not know he had the meeting set up.

Q. Is that Ray Edwards who just left the room?

A. Yes, my assistant.

Q. And did there come a time when you, in fact, met with some of the employees of AA Electric?

A. Yes, sir. I met the following Monday with five of the employees of AA Electric Co.

[15] Q. What date was that, Mr. Moore?

A. It would be March 18.

Q. All of these dates are 1968, is that correct?

A. Yes, sir.

Q. Where did you meet with the employees?

A. In my office.

Q. What time did you say it was?

A. Immediately after work. I imagine probably between 5:00 and 5:30 or 5:15.

Q. What employees were present?

A. There was Mr. Don Cockrum, Mr. Bud Wilson, Mr. Claude Sanders and Mr. Wesley Smith and Mr. Bill Cockrum.

Q. Is Bud Wilson also known as Albert Wilson?

A. Yes, sir.

Q. Is Wesley Smith's first name George?

A. Yes, sir.

Q. Now, who was present—do you know what Bill Cockrum's full name is?

A. I guess it is William. I do not know. Bill is all I have ever called him and I have known him for years.

Q. Now who was present on behalf of the union?

A. Ray Edwards and myself.

Q. Tell us what transpired at this meeting, Mr. Moore?

A. Well, at the meeting the boys told me that they wanted to have us to be their collective bargaining representative, that we were—

MR. JONES: Objection. Hearsay.

TRIAL EXAMINER: This is not being offered for the truth of what the witness is reporting but merely of what was said to him.

Go ahead.

A. (continuing)—they stated that they had been contacted by Wesley Smith on the previous week who had asked for a meeting with them at that time talking to them on District 50 and that Smith had been requested to do this. He—

MR. JONES (interrupting): I object to this, I believe this is hearsay.

MR. WALSH: I am just trying to elicit what transpired at their meeting.

TRIAL EXAMINER: Go ahead.

A. (continuing)—said that Smith had been contacted by Mr. Scrivener and Mr. Scrivener had asked to see if the people would join District 50 and they did not want to join District 50 so therefore came to us to see if we would represent them in collective bargaining.

Q. (By Mr. Walsh) Now, what did you tell these employees, Mr. Moore?

A. I told these employees this. That if they wanted me to represent them that I would be most happy to do so. I would request that they sign an authorization card and this authorization card that they were to sign, if they were not willing for their employer to see, I did not want them to sign it because I intended to get ahold of Mr. Scrivener as I knew him pretty well. If he requested to see the cards then I would show them to him and that I

wanted them to know that if they had any doubt in their minds about signing the card that I would rather they did not sign it. I did not want them to sign it and be afraid of it.

Q. (By Mr. Walsh) Mr. Moore, I want to show you General Counsel's Exhibits 3-A through 3-E for identification and ask you if you can identify those for us please?

A. These are the authorization cards which I gave. I gave the following people that are listed here these cards to sign if they wanted to be represented.

Q. What happened? What did they do with them? Did you give them the blank cards?

A. I gave them the [18] blank cards and they immediately signed them, handed them back to me or Ray. We were both sitting there at the table.

Q. All right. Fine. Do you recall anything else that was said at this meeting with the employees?

A. There was some question in some of them's minds whether or not the I.B.E.W. would take them as wire men. This would be brought out that we did have an examination within our by-laws that these people would be required to take. There was also some question at this time brought up about whether or not the local would take on the older employees and I told them that we would work this out and we had no problem. That was with Claude Sanders on account of his age.

Q. Is that about the gist of the conversation?

A. Yes.

Q. What did you do after you met with these employees?

A. I went immediately after they left the office in and called Mr. Scrivener on the telephone and asked for a meeting with him for the following day.

Q. Did he agree to meet with you?

A. Yes, sir.

Q. At that time did you tell him anything about the contact you had had with his employees?

A. I told him I had had contact with some of his employees and would like to talk to him about working out a contract with him.

[19] Q. All right. Did you subsequently, in fact, meet with Mr. Scrivener?

A. Yes, sir.

Q. When was this, Mr. Moore?

A. Approximately 8:15 the following day Mr. Scrivener came to my office and we sat down and had about an hour and a half meeting, I expect.

Q. What would the date of this have been, Mr. Moore?

A. It is on a Tuesday which would have been, I believe, the 19th.

Q. The 19th of March?

A. Yes, sir.

Q. When was it in relation to when the union cards were signed?

A. One day. It was immediately after the union cards were signed that I called Mr. Scrivener and he came up the next morning.

Q. Will you tell us please what the discussion was that you had with Mr. Scrivener at this time?

A. Well, Bob and I did some reminiscing over some of the things that had gone on in the past. I have known Bob for better than 20 years and worked with him with the tools several years ago.

Q. Was anybody else present at this meeting?

A. My assistant, Ray Edwards.

[20] Q. Are you the only ones present?

A. We were the only ones, the only three.

Q. Continue on, please.

A. I told Bob we represented the majority of his employees and that we would like to have a collective bargaining agreement with him. Bob said that he kind of doubted that we did. I showed him the cards. He looked at the cards and said that I had one more man than he had employees. I said, "Well, I knew he had one man that wasn't there by the name of Boyd Perryman." I asked him who he was questioning that I had who wasn't employed, and he said, "Don Cockrum". My assistant, Ray Edwards said, "Well, Bob, I've seen Don on the job, I saw him yesterday."

Bob said, "Well, I guess he did work yesterday." Bob asked me, "Well, what do you want me to do, send these men all into you at noon?" I said, "No, Bob, I want you to take and keep these employees and file a collective bargaining agreement with us. We will be glad to try to work one out."

Now, Bob asked me if he did this the possibility of getting additional men through our hiring hall, and I even named off some names of some boys available that he possibly could get. He was telling me that if he signed a union agreement he would try to come up with quite a bit of additional work and that he thought he could possibly get an awful lot of the residential work in Springfield if I could [21] furnish him qualified people and I told him I would be more than happy to furnish him additional people anytime he put a call in for them.

When he left he told me he was going to talk to his attorney, Mr. Sam Appleby, that he and Sam were friends and that he was going there from my office, and that he would be getting in touch with me. He also told me he did not know whether he could sign an agreement with us or not, that he understood there was another labor organization that these people might already be tied down to. I told him he had no fear there, that we were the only labor organization involved, that I had this assurance from the people.

This, I guess, is pretty well the conversation.

Q. Was there anything said at this time about settlement agreement?

A. Yes. Bob asked us about an agreement and I went in and got the construction agreement we had, Ray went in and got it, and he handed it to Bob. Bob also said to Ray at the time, "Ray, would you outline anything that would be a cost item to us that you would expect, and give me a copy of it?"

Q. After this meeting did you hear any more from Mr. Scrivener?

A. Until today I don't believe I have seen Bob since then.

MR. WALSH: That is all I have, Your Honor.

CROSS-EXAMINATION

Q. (By Mr. Jones) You did say that Mr. Scrivener [22] doubted you had all of the men signed up, a majority of the men signed up?

A. Yes, sir.

Q. Isn't it true that all the residential contractors in Springfield, Missouri, are non-union?

A: No, sir.

Q: A vast majority?

MR. WALSH: I object.

Q. (By Mr. Jones) I am talking about residential electrical.

TRIAL EXAMINER: What is the point?

MR. JONES: He stated that he attributes to Mr. Scrivener he could get an awful lot of residential work in Springfield if he signed up with Mr. Moore's union, and I submit that because all the other residential contractors in Springfield, the ones which do exclusive residential work, are non-union, that this makes that statement improbable.

TRIAL EXAMINER: I will allow it.

A. Several of these contractors do residential work and commercial work.

Q. (By Mr. Jones) I am talking about those doing exclusively residential work. You don't have a single one of those signed up, do you?

A. We do a lot of residential work, but we don't have any that is exclusively residential.

Q. So it wouldn't be very likely that Mr. Scrivener stated to you the remark attributed to him that if he signed up with you he would get an awful lot of residential work?

MR. WALSH: I object; it is argumentative.

TRIAL EXAMINER: Sustained.

[25] Q. (By Mr. Jones) In regard to the cards signed by the employees, what did you say, what statements did you make to them prior to their signing, about the signing of the cards?

A. I told them they were the authorization cards and that if they signed them I wanted them to be willing for me to show them to their employer, and that they were cards for us to be the collective bargaining agent.

Q. Didn't you tell them these cards were to be used to obtain an N.L.R.B. election?

A. Only on refusal of bargaining.

Q. Yes. You told the employees those cards were to obtain an N.L.R.B. election?

A. No, sir, I told them them cards were to go to Mr.

Scrivener to ask for representation, and if Mr. Scrivener, if we went this route and failed, that we could use the cards to go to the N.L.R.B. and request an election.

Q. Didn't you tell them that is what would be done?

A. No, sir. Let me rephrase that. I told them that if Mr. Scrivener refused that we would go this route.

Q. That you would get an election before the N.L.R.B.?

A. I told them we would file with the N.L.R.B. if Mr. Scrivener refused to bargain with us.

Q. You told them you would file for an election, didn't you?

[26] MR. WALSH: I object. This is repetitious.

A. I don't remember just exactly. I did tell them this, I would file the cards with the N.L.R.B. if Mr. Scrivener refused to bargain.

Q. And you never petitioned for an election as you told them you would, the employees?

A. There is no petition, as such, I don't think that has never been filed for an election. We did file an unfair labor practice charge, an 8(5) charge, I believe, which would take care of the —

MR. JONES (interrupting): I believe that is all.

TRIAL EXAMINER: Any further redirect?

[27] RECROSS-EXAMINATION

Q. (By Mr. Jones) One other question. Did you not tell Mr. Scrivener that you would give him a type of contract that you would demand him to sign, and didn't you tell him he would have to sign it by 6 o'clock that evening?

A. No, sir.

Q. Or you were going to file a charge against him?

A. No, sir, I sure did not.

Q. Isn't this contract you gave him a —

A. (Interrupting) It is a contract with the National Electrical Contractors Association.

Q. Has Mr. Scrivener ever belonged to that association?

A. I don't know; as far as I know he hasn't.

Q. Didn't you tell him he would have to join that association, would have to sign that contract by 6 o'clock that evening, or you were going to file charges against him?

A. Absolutely not.

Q. You did give him another contract, did you not?

[28] A. He asked for a sample agreement, and we gave him that agreement.

Q. An 18-page document?

A. I don't know the exact pages.

Q. Let me show you this—

MR. JONES: Mark this please.

(The document above referred to was marked Respondent's Exhibit No. 4 for identification.)

Q. (By Mr. Jones) I will hand you what has been marked as Respondent's Exhibit No. 4 and ask if that is the contract you handed to Bob Scrivener.

A. This is the one he received in my office. My assistant, Ray Edwards, got it for him. I was on the telephone in a conversation with somebody else at the time.

Q. And that was on the date he was in your office pursuant to your request?

A. On the 19th, I guess it was, 18th or 19th.

Q. Did you ever present Mr. Scrivener with any other contract proposal besides this document, Respondent's Exhibit No. 4?

A. I never did talk to him after that. He wanted to take time to look at that and he was to get ahold of me later that week, but I never did hear from him any more.

Q. Did you ever present him with a contract proposal [29] besides this one?

A. I never did see him again.

TRIAL EXAMINER: The answer is that you never presented him with any other contract agreements?

THE WITNESS: That's right.

MR. JONES: That is all.

REDIRECT EXAMINATION.

Q. (By Mr. Francka) Did Mr. Scrivener present to you any proposal?

A. No, sir.

Q. Did he discuss any particular provision of this contract with you? Did he voice any objections to any provision?

A. He talked about our fringe benefits that we had set up and wanted to know how much this amounted to and how much that amounted to. This was the only thing.

Q. Was it a matter of inquiry?

MR. JONES: Your Honor, excuse me just a minute. I do object to the Charging Party being represented by two counsel.

TRIAL EXAMINER: The Charging Party is represented by one counsel only.

MR. JONES: I just wanted to make my objection for the record, that I think it improper for the Charging Party's attorney to participate.

TRIAL EXAMINER: Mr. Jones, the Charging Party is entitled to participate and be represented by its attorney and always has been.

[30] MR. FRANCKA: I am finished.

TRIAL EXAMINER: Let me ask you—go ahead.

MR. JONES: That is all.

MR. WALSH: I have nothing further.

TRIAL EXAMINER: Let me ask you, was there any discussion of this agreement at your meeting?

THE WITNESS: The only discussion was Bob asked some questions on fringe benefits in the agreement, what we had in the way of fringes there, which was pretty much it. Bob has worked under our collective bargaining agreement several times and knows pretty well what it has in it.

TRIAL EXAMINER: What I am asking is, did you not indicate you were on the phone when your assistant got this contract?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: What I am asking you now is, was there any discussion between you and Mr. Scrivener at that time about this document?

THE WITNESS: After I got off the phone Bob and I talked for just a minute about it, but all we actually talked about was these fringes. As I said earlier in my testimony, Bob did not—well, he asked Ray to work out a list of the actual costs on each one of the fringes that we would have to request of him if he signed an agreement with us. Bob did ask my assistant to work that up.

[31] TRIAL EXAMINER: You said just a moment ago that he did work under an agreement like this at one point?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Was that on a particular job?

THE WITNESS: Let me clarify this. He was a wireman who worked under an agreement, not as an employer.

TRIAL EXAMINER: I see, as an employee of some other company, some other contractor?

THE WITNESS: Yes.

TRIAL EXAMINER: Anything further, gentlemen?

MR. JONES: Just one to clarify the record.

RECROSS-EXAMINATION

Q. (By Mr. Jones) Your union, the I.B.E.W., Local No. 453, has never had any contractual relationship with Bob Scrivener, the Respondent, at any time?

A. No, sir.

MR. JONES: That is all I have.

TRIAL EXAMINER: Anything further of this witness?

MR. JONES: That's all.

MR. WALSH: No, sir, I have nothing.

TRIAL EXAMINER: Thank you, you are excused.

* * *

[32]

WESLEY SMITH

was called as a witness by and on behalf of General Counsel and, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

TRIAL EXAMINER: Be seated and give us your full name and address, please.

THE WITNESS: My name is Wesley Smith.

TRIAL EXAMINER: And your address?

THE WITNESS: Route 2, Box 44, Republic, Missouri.

TRIAL EXAMINER: Mr. Smith, please speak up good and loud so we can all hear you. Otherwise, we will have to interrupt you and ask you to speak up.

Q. (By Mr. Walsh) Mr. Smith, have you ever worked for Mr. Bob Scrivener, doing business as the A. A. Electric?

A. Yes, sir.

Q. Tell us the date you started there.

A. I started in late August of '66.

Q. August of '66. Did you work continually for him during that period of time until March 18, 1968?

A. Yes, sir.

Q. During that period of time have you laid off?

A. Two or three times.

Q. And for how long a period of time were those?

[33] A. Two or three days at a time.

Q. Was it ever more than two or three days?

A. No.

Q. On March 18, 1968, what was your job with Mr. Scrivener?

A. A journeyman electrician.

Q. How long had you been employed by him as a journeyman?

A. About a year and seven months.

Q. Tell us, please, what business was Mr. Scrivener in at this time?

A. He is an electrical contractor.

Q. Just describe briefly for us the type of work the company did.

A. He does residential and commercial.

Q. Was this type of work being done, say, from the 1st of January to the 18th of March?

A. Right.

Q. Was it, in fact, the kind of work being done since you have been working for him?

A. Right.

Q. Speaking of the time March 18, 1968, what employees were working for Mr. Scrivener at this time?

A. There was Allen Wilson, Bill Cockrum, Don Cockrum, Claude Sanders, and myself.

Q. Was Mr. Perryman working for Mr. Scrivener?

A. Right; Boyd Perryman.

[34] Q. Tell us the duties of each one of these employees. Let us talk about what Bill Cockrum did.

A. He is a journeyman electrician.

Q. How about Don Cockrum?

A. He was an apprentice.

Q. What kind of work did he do?

A. He is a helper.

Q. How about Albert Wilson?

A. Journeyman electrician.

Q. Yourself?

A. Journeyman electrician.

Q. What did Mr. Perryman do?

A. He was a helper.

Q. How about Mr. Sanders?

A. Helper.

Q. Was there any other employees employed by Mr. Scrivener in his business at this time?

A. There was Don Cockrum.

Q. I thought we had already mentioned him.

A. We mentioned him?

Q. Yes, sir. Were there any others you can recall at this time?

A. That is all.

Q. Did there come a time around the period of early March, mid-March, 1968, when you had a discussion with [35] Mr. Scrivener about a union?

A. It was on March 15, in the evening.

Q. Tell us, please, the circumstances of this conversation, where it took place.

A. It took place in Pinehurst, coming out of the house.

Q. Is this a jobsite?

A. A job, yes.

Q. Was anyone else present?

A. Claude Sanders was with me as my helper.

Q. Now, in your own words, what happened?

A. He came in and wanted me to come out to the truck.

Q. Who wanted you to come out to the truck?

A. Bob Scrivener.

Q. All right.

A. I went out to the truck with him and he asked me, if he decided to go into District 50 he would get a lot of commercial work and do residential to fill in, keep the men busy, and would I talk to the men when I got in about going in to District 50. I said I would.

Q. Was anybody party to this conversation?

A. No, just me and Bob.

Q. Mr. Sanders wasn't around then, is that correct?

A. That's right.

Q. Do you recall anything else that was said at this time?

A. Not until I got in that evening.

[36] Q. Go back and tell us what happened after that. Did you go back to the shop after work?

A. I went back and finished the day. I got to the shop about 20 minutes until 5 that evening.

Q. Who was present at the shop?

A. Albert Wilson, Bill Cockrum, Don Cockrum, Boyd Perryman, Claude Sanders and myself, and Bob Scrivener.

Q. Are those all who were present?

A. Right.

Q. Tell us what was said at this meeting, if you would please.

A. Everybody was talking. I kind of waited until they got quiet a little bit, and then I asked them if they would like to go in the union, and I asked each one of them. They all shook their heads.

MR. JONES: Shook it which way? I don't understand.

THE WITNESS: They all agreed, shook it up and down.

TRIAL EXAMINER: The witness has indicated as he is shaking his head.

A. (Continuing) They all agreed they would go in and get in the union. I told Bob, "There it is."

Q. (By Mr. Walsh) Did you say what union when you proposed this to them?

A. Not that I remember.

[37] Q. What did Mr. Scrivener say?

A. Well, he got up and said he would check with Kansas City and make arrangements to go there and see what they had to offer.

Q. Did he mention any union in particular?

A. District 50.

Q. Do you recall anything else that was said at that time?

A. No, just that he was going to make arrangements to go there, or write to them.

Q. Did there come a time, Mr. Smith, when you had some contact with Local 453, the Electrical Workers?

A. Yes.

Q. Tell me, did you go to a meeting at the union hall?

A. We all met.

Q. I am just asking did you go to a meeting at the union hall.

A. Yes.

Q. Tell me how you came to go there.

A. Claude Sanders and me was working that morning and Claude said that "Bud" and Bill said to come up to the union hall that evening and see what they had to offer. That is when we went up to the union hall, on the 18th.

Q. What was that date?

A. The 18th of March.

Q. And this was 1968?

A. Right.

[38] Q. All this period of time we are talking about is 1968, unless I tell you otherwise, all right?

A. All right.

Q. Who was present at the union hall?

A. When I got there there was Albert Wilson, Bill Cockrum, Don Cockrum, Claude Sanders and myself.

Q. Were there any union representatives present?

A. Yes, sir.

Q. Who was there?

A. Jack Moore and Ray Edwards.

Q. I want to show you what has been marked for identification as General Counsel's Exhibit No. 3-D, and ask you if you have ever seen that before.

A. Yes, this is my name, my writing.

Q. Did you fill this card out on March 18th?

A. Right.

Q. Where did you fill it out?

A. At the union hall.

Q. Is that your signature on there?

A. Right.

Q. And what did you do with it after you executed it and signed it?

A. I gave it to Ray Edwards and he picked it up.

MR. WALSH: I offer this, General Counsel's Exhibit No. 3-D, in evidence, Your Honor.

[39] MR. JONES: I don't think so.

TRIAL EXAMINER: Hearing no objections, it is received.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 3-D, was received in evidence.)

Q. (By Mr. Walsh) Did you go to work the day after this meeting at the union hall you have testified to?

A. Yes.

Q. Did you have any discussions with Mr. Scrivener on that day about the union?

A. Yes.

Q. Tell us what happened that day as best you can recall.

A. We was working on South Florence at an apartment house when he came by.

Q. Who came by?

A. Bob Scrivener came by, which was after meeting Jack Moore.

I was working on the bottom floor and Claude Sanders was outside. I heard Bob ask Claude if I, where I was at, and he was telling him to come upstairs. So I came upstairs with "Bud" Wilson and Boyd Perryman.

Q. You came up there?

A. Yes, sir.

Q. Tell me what was said at this time.

A. Bob said he just left Jack Moore's office and he was surprised [40] when he seen our names on these cards to represent us in the union. He said that it wouldn't have been so bad if we went up there as a group to see what they had to offer. "Bud" Wilson said that he thought that was what he wanted to do, go in the union, and Bob said that it wasn't 453, that he wanted to go in District 50.

Q. Can you recall anythnig else he said at this time?

A. He said that since we signed them cards he was just going to have to let us go.

Q. Do you recall anything else he said?

A. Some more was said, but I can't remember exactly what it was.

Q. What did you do after work that day, Mr. Smith?

A. That same day Bob said we were going to have a meeting at the shop, that his attorney wanted to talk to us when we got off, and for us to start picking up our materials as it was close to 3:30 or 4 o'clock, and we left around 4 o'clock for the shop. He said his attorney was going to be there.

Q. Did you, in fact, have a meeting at the shop with Mr. Scrivener and his attorney?

A. Yes.

Q. Tell us who was present at this meeting.

A. Bill Cockrum, Don Cockrum, Albert Wilson, Claude Sanders, Boyd Perryman and myself.

Q. Was Mr. Scrivener there?

A. Yes, sir.

[41] Q. Was Mr. Jones there?

A. And Mr. Jones.

Q. Tell us what transpired at the meeting.

A. We waited around there until Don Jones showed up. He introduced himself to us and he started talking about how Bob did not qualify to go in the union, that he did not make so much money to be taken in, and that he could not pay that two per cent NECA.

Q. Is that NECA, National Electrical Contractors Association?

A. Yes.

Q. Can you tell us the best you recall about Scrivener not qualifying to go in the union?

MR. JONES: Objection. There is no charge or violation on anything I said.

TRIAL EXAMINER: Are you making an allegation on the unfair labor practice allegation?

MR. WALSH: No, I am not, Your Honor, but this is all leading up to something that happened. I think the entire conversation ought to be developed.

MR. JONES: I just want to preserve my objection. If he is trying to amend the pleadings somehow, I want to object.

TRIAL EXAMINER: Go ahead.

MR. WALSH: No, sir, we have not alleged Mr. Jones violated the Act, and I do not intend to amend it to [42] so reflect, unless information comes to my attention of which I am unaware at this time.

TRIAL EXAMINER: Go ahead.

Q. (By Mr. Walsh) Tell us what was said about not qualifying to go into the union.

A. He said he had to make \$50,000 to be taken in.

Q. Do you recall if anything was said about the Labor Board?

A. No, not that I remember.

Q. Continue on, please, what was said by Mr. Jones and what was said by Mr. Scrivener.

A. There were a few things I did not understand what he said. He brought up about District 50 having a suit against 453, and that is about all I can remember.

Q. What did Mr. Scrivener say?

A. I don't remember he said anything. Mr. Don Jones done most of the talking.

Q. Did there come a time when the subject of some employees getting their checks come up?

A. Yes.

Q. How did this subject come up?

A. Well, Bob Scrivener wanted to know if we had changed our minds about going into 453 and we said no, and he said he would just have to give us our checks. So they went inside and brought the checks out to us.

[43] Q. Whose checks did he bring out?

A. Bill Cockrum, Albert Wilson and myself.

Q. What happened then?

A. Bill Cockrum asked him if he was fired. Bob turned to Mr. Jones, Don Jones, and asked him what to say, and Don Jones said "Let them go up to the hall and be placed there."

Q. Were you then given your checks?

A. Yes.

Q. Did you start to leave the premises then?

A. Yes.

Q. What happened then?

A. Bob came out and said we could come back to work the next morning.

Q. He told you you could come back to work the next morning?

A. Yes.

Q. Did you report to work the next morning?

A. Yes.

Q. Tell us what happened then.

A. He gave us our jobs to go to, and Bill Cockrum and myself was going to the apartments, the apartments on Florence. We were loading up and that is when he came out there and asked if we still felt like that was the union and we said yes. He said he couldn't use us, so he let us go.

Q. Did you leave the premises the morning of the 20th?

A. Right.

[44] Q. You never began work, is that right?

A. That's right.

Q. Had you been given work assignments by Mr. Scrivener before he told you this?

A. Yes.

Q. Did you have any further contacts with Mr. Scrivener or discussions with him about this union situation?

A. He called me up the next night.

Q. He called you on the telephone?

A. Yes.

Q. How do you know it was him?

A. I thought it was Bill Cockrum at first, but Bob said it was Bob and so I recognized him.

Q. Tell us what was said then, please.

MR. JONES: I object to this. I would like to have voir dire on this witness, I would like to voir dire him on the telephone conversation.

TRIAL EXAMINER: On what basis, counsel?

MR. JONES: To clarify the identification of the voice.

TRIAL EXAMINER: Is this conversation, is it going to be denied there was a conversation between this witness and Mr. Scrivener?

MR. JONES: I believe it will, I don't know.

TRIAL EXAMINER: Let's find out.

MR. WALSH: Do you want him (indicating) excused while we are talking about it?

[45] TRIAL EXAMINER: Just a minute.

MR. JONES: My client does not recall a telephone conversation with this witness.

MR. WALSH: I don't care if you ask him questions. He said the caller identified himself and he recognized his voice.

MR. JONES: He said at first—

TRIAL EXAMINER (interrupting): Let's let him ask him the question on voir dire.

MR. JONES: When was this conversation?

THE WITNESS: It was on the 20th.

MR. JONES: March 20th, 1968?

THE WITNESS: Yes.

MR. JONES: And at first you thought it sounded like Bill Cockrum?

THE WITNESS: Yes.

MR. JONES: And when did you change your mind?

THE WITNESS: When he identified himself and I recognized his voice.

MR. JONES: Where were you when you received this call?

THE WITNESS: At home.

MR. JONES: What is your phone number?

THE WITNESS: PE 2-7512.

MR. JONES: Is that a Republic number?

THE WITNESS: Yes, sir.

[46] MR. JONES: And what time of day was it?

THE WITNESS: It was around 7 or 7:30.

MR. JONES: Did you answer the phone when it rang or did someone else in your family answer it?

THE WITNESS: I answered it myself.

MR. JONES: And you can say positively it was Bob Scrivener who was calling you at that time?

THE WITNESS: Yes, sir.

MR. JONES: How can you be positive?

THE WITNESS: Because he identified himself.

MR. JONES: Is that what you base it on?

THE WITNESS: Sure.

MR. JONES: I believe that is all.

TRIAL EXAMINER: Proceed.

MR. JONES: I would object to any further testimony on this conversation, because I believe he states his basis of identification is on what the caller stated to him the identification was, which is not a competent way.

TRIAL EXAMINER: The witness, I think, testified more than that. He testified that when the caller identified himself he recognized his voice.

.

[47] Q. What was said during this conversation?

A. Bob said he would like for me to come back to work, that he hated to see my family suffer on account of this. He said that these other contractors got together to keep us from working, and we wouldn't find a job.

Q. Did he name any of the contractors?

A. He said Balmer—

Q. (Interrupting) B-a-l-m-e-r?

A. Yes.

Q. Who else?

A. Ivan Franks and Jim Mitchell. He also said they could furnish him some men if he needed them.

Q. Who are these names again, so the record is clear on this?

A. Ivan Franks, Balmer—

MR. JONES (interrupting): How do you spell that, I can't understand you?

THE WITNESS: B-a-l-m-e-r.

Q. (By Mr. Walsh) Who are they?

A. They are electrical contractors.

Q. In this area?

A. Yes, sir.

Q. What did Mr. Scrivener say about them?

A. He said they got together and banned us.

[48] Q. What did you say?

A. I told Bob that I was planning on going through with it because I felt I could better myself. He said that if I would change my mind I could come back to work within two weeks.

Q. Was anything else said at that time?

A. No, we hung up.

Q. I want to show you what has been received in evidence, a copy of Respondent's Exhibit No. 2, a copy of a letter. Have you ever seen a letter such as that, the letter of which that is a copy?

A. Yes, I received one like this on March 25th.

Q. What, if anything, did you do as a result of receiving this letter?

A. I notified Ray Edwards about it.

Q. What did you tell him?

A. I told him I received this letter and he told me to go on back to work. So on the 26th I went back to work.

Q. The 26th of March?

A. Yes.

Q. How long did you work then?

A. The 26th and 27th.

Q. What happened after the 27th?

A. We got laid off.

Q. How did you come to be laid off?

A. Bob said [49] we got caught up on work and he would have to lay us off a few days.

Q. What method did he use to lay you off?

A. Well, he drew straws.

Q. Who were the participants in this straw drawing?

A. Just Albert Wilson and myself.

Q. Just you two drew?

A. Right.

Q. And you lost, is that correct?

A. Yes, sir. Bob Scrivener drew for Bill Cockrum.

Q. So there were three participants, Mr. Scrivener drawing on behalf of Mr. Bill Cockrum, is that correct?

A. Yes.

Q. How did Bill Cockrum get informed he lost?

A. Bob called him and then called me asking me to tell him he was laid off.

Q. And you told him when you got him on the phone?

A. Yes.

Q. When you returned to work on March 26th, Mr. Smith, had any new employees been hired?

A. Yes.

Q. Who was working there than hadn't been working on March 19th and 20th?

A. There was Clyde Hunt and Jim Statton.

Q. What are they?

A. Clyde Hunt is a journeyman [50] and the other one is an apprentice.

Q. Had you ever seen them working for Mr. Scrivener prior to March 26th?

A. No.

Q. After you were laid off on March 27th, did there come a time when you were again recalled to work?

A. Yes.

MR. WALSH: Does anyone object to my giving the witness a calendar? There are no notes on it.

MR. JONES: No.

TRIAL EXAMINER: Go ahead.

Q. (By Mr. Walsh) This might help you a little, Mr. Smith. These dates are confusing. My question is, you testified the last day you worked this time is March 27th, is that correct?

A. 27th, right.

Q. Did there come a time when you went back to work for Mr. Scrivener?

A. Yes.

Q. When was that?

A. April 1.

Q. How did that come about?

A. He called me on Saturday and said for me to come back to work Monday.

Q. Did you, in fact, return to work?

A. Yes.

[51] Q. Did there come a time, Mr. Smith, when you gave a statement to Mr. Frerking of the Labor Board of the charges the union filed in this case?

A. Yes.

Q. What was the date of that statement?

A. The 17th.

Q. Of what?

A. April.

Q. Had you been working for Mr. Scrivener since the 1st of April until the 17th of April?

A. Yes.

Q. Had you been laid off during that time?

A. No, sir.

Q. Did you go to work on the 18th of April?

A. Yes, sir.

Q. Tell us, what, if anything, happened after work on the 18th of April?

A. I was working with Boyd Perryman. We was in a house over on Linden. Bob came by and they were talking. After they left there, on the way to Boyd's house, he told me I was going to get laid off again it looked like, it looked like us boys were going to get laid off again.

TRIAL EXAMINER: I don't understand who said this.

THE WITNESS: Mr. Boyd Perryman.

TRIAL EXAMINER: All right.

[52] Q. (By Mr. Walsh) What happened?

MR. JONES: I object to that. I couldn't understand who was supposed to have said what. It would be hearsay.

TRIAL EXAMINER: At the present time it is hearsay.

MR. WALSH: I didn't want him to say that either, but I think it is immaterial. I am going to tie it in with later events.

TRIAL EXAMINER: It does not bind the company at this time unless he is shown to be an agent of this company.

MR. WALSH: Mr. Perryman is a rank and file employee of the company.

Q. (By Mr. Walsh) So what happened during the balance of the day?

A. We went out and worked. He said he was caught up again.

Q. Who said this?

A. Mr. Bob Scrivener. He said would we want our checks or wait until Friday, and I said that we wanted our checks now.

Q. Who got checks this time?

A. "Bud" Wilson and myself, Albert Wilson and myself.

Q. Who else, anyone else?

A. That's all.

Q. Do you know what work Mr. Scrivener had going on at this time?

A. Just the jobs I worked on myself.

[53] Q. What were those jobs?

A. Most residential.

Q. How many did he have in progress at this time?

A. I couldn't say exactly how many.

Q. How many had you worked on during the time you had been back?

A. I couldn't say, there were quite a few of them.

Q. During this period of time?

A. Right.

Q. Were these unfinished jobs?

A. Some were unfinished and some would be relatively new.

Q. Was there any commercial work going on at this time that you worked on?

A. Yes, there was an apartment house.

Q. What was the location of that?

A. South Florence.

Q. Was that project completed on the 18th of April?

A. No.

Q. How big of a building was it?

A. It was an eleven-unit building, eleven apartments.

Q. Tell us at what state the work was on the apartments on April 18th.

A. What we call roughing in.

Q. What is that, what does that mean?

A. Running pipes.

[54] Q. What remains to be done after that?

A. Pulling wire and hand fixtures and stuff.

Q. What was the normal work crew on a job like that?

A. Well, usually two men, sometimes three or four. It varies.

Q. How long would it take two men to have completed the job after April 18th?

A. It was almost completed on the rough-in part.

Q. What else needed to be done?

A. Just pulling wire and building the services.

Q. How long would the work remaining have taken?

A. Oh, I would say a couple of weeks.

Q. Actually you were laid off on April 18th. Did you ever return to work for Mr. Scrivener?

A. Yes, I went back to work for him on May 4th.

Q. Have you been working for him ever since?

A. Yes.

DIRECT EXAMINATION

[57] Q. (By Mr. Francka) In reference to Boyd Perryman, do you know what relation he is to Mr. Scrivener, if any?

A. Yes.

Q. What is the relationship?

MR. JONES: Objection; immaterial and irrelevant.

TRIAL EXAMINER: Are you going to—

MR. FRANCKA (interrupting): I thought there might be some significance to establish there is some relationship here in reference to any conversations that might have involved him. That was my only purpose.

TRIAL EXAMINER: I don't think it is going to help on that point.

MR. FRANCKA: That is all I have.

CROSS-EXAMINATION

Q. (By Mr. Jones) Mr. Smith, what was—

MR. WALSH (Interrupting): Mr. Examiner, I forgot one or two things. May I inquire.

TRIAL EXAMINER: All right, let's finish up and Mr. Jones can have a complete cross at this.

DIRECT EXAMINATION

Q. (By Mr. Walsh) On the 18th of April, the day you were laid off, what was the work force that day? Who was working for Mr. Scrivener that day?

A. Bill Cockrum, Don Cockrum, Albert Wilson, Claude Sanders, Boyd Perryman and myself.

[58] Q. When you returned on May 4th—strike that. From the time you returned on May 4th to the present, has the work force been the same?

A. The same amount of men?

Q. Yes, sir.

A. No quite.

Q. Tell us who was working when you came back on May 4th?

A. There was Clyde Hunt, Jim Statton.

Q. Was Mr. Perryman there?

A. Yes, sir.

Q. How about Don Cockrum?

A. He came back later, about a couple of weeks ago.

Q. Was there any one else?

A. That's about it.

Q. Is that the work force as it exists today?

A. Yes.

Q. You said Don Cockrum came back sometime after May 4th?

A. Correct.

* * * *

CROSS-EXAMINATION

Q. (By Mr. Jones) There is no contention, as I understand the testimony, Mr. Smith, that Mr. Scrivener ever took any action [59] with reference to you for talking to any Labor Board man or anything like that, is there?

MR. WALSH: I object. That is drawing a conclusion.

TRIAL EXAMINER: The complaint states—

MR. JONES (interrupting) There was something about talking to a Labor Board man, I don't recall. You don't claim, do you—

TRIAL EXAMINER (interrupting) It seems to me the question should be directed to counsel.

MR. WALSH: I think the record speaks for itself. It is certainly not a proper question to direct to this witness. He did not testify at all about talking to a Labor Board man, other than the fact that he had.

MR. JONES: You mentioned it in a question and I wasn't sure if you were relying on that or not. I just wanted it to be clear in the record. If you are not relying on this man's testimony to support an 8(a)(4)—

MR. WALSH (interrupting) I am relying on it, the testimony I put in the record.

MR. JONES: Through this witness?

MR. WALSH: Through the witness, all witnesses.

TRIAL EXAMINER: You are talking about Paragraph 5c?

MR. JONES: Yes, I believe that is it, Your Honor.

TRIAL EXAMINER: Paragraph 5c contains this witness's name.

[60] MR. WALSH: Yes, and it is conclusionary.

TRIAL EXAMINER: It is a conclusionary narrative.

MR. WALSH: And I think 4b would be the statural allegations, and, of course, this witness did not testify as to any interrogation by Mr. Scrivener. So, to that extent, this testimony would directly support 4b.

Q. (By Mr. Jones) Let me ask you this, you say you have worked for this company how long?

A. About a year and seven months.

Q. During all that time isn't it true there have been occasions of layoffs during all the time you have been employed by this employer?

A. Yes, a few.

Q. And sometimes you are laid off in the middle of the day and sometimes at the end of the day?

A. No, the end of the day mostly.

Q. Mostly, but sometimes it has happened both ways back over the past two years or so, however long you have been there?

MR. WALSH: Could I ask counsel if he is talking about this witness.

MR. JONES: Yes, I am talking about in his experience.

TRIAL EXAMINER: The question is have you ever been laid off since you have worked for Scrivener in the middle of the day.

THE WITNESS: Before?

[61] TRIAL EXAMINER: At any time.

THE WITNESS: Not in the middle of the day.

Q. (By Mr. Jones) When did you first become interested in joining Local 453?

A. Well, it was, I believe, the 16th.

Q. Of March?

A. March.

Q. In other words, there was no claim that you were interested in joining the union back in January of 1968?

A. No.

Q. So any layoffs that occurred in January of 1968, or any weeks you worked less than a full 40 hours in January of 1968 would not have had anything to do with your in-

terest in the union or your talking to an N.L.R.B. agent, or anything, would it?

A. Well, I did not consider it until the date Claude Sanders called me and told me the fellows were going to the hall and told me to find out about 453.

Q. But at anytime you worked less than 40 hours a week back in January or February of 1968, you would not claim that that was discrimination against you because of any union activity?

MR. WALSH: I object. I think that has been admitted. The testimony is clear as to when he first had contact with the union. We have not alleged anything prior to March 19.

TRIAL EXAMINER: The question as to what is contained in the complaint is not from this witness, but from [62] the investigation from the region and what the Regional Director said, so I don't think that is quite proper to ask this witness what he is claiming.

MR. JONES: All right. I take it he is not a charging party himself.

TRIAL EXAMINER: I did not say that, counsel. The charge is filed by whomever the charge is filed.

MR. WALSH: The I.B.E.W. has alleged discrimination.

TRIAL EXAMINER: And as a discriminatee he is a party here.

MR. JONES: I am just trying to cover this. I think this is self-explanatory in the record.

TRIAL EXAMINER: Do you want to excuse the witness and explain the point you want to make.

MR. JONES: No, I will just go on.

Q. (By Mr. Jones) Isn't it true, Mr. Smith, that when you received your check January 5, 1968, that you only worked 32 hours that week?

A. I don't remember.

Q. The next week, January 12, 1968, isn't it true you only worked 34 hours that week?

A. I know I missed some time back in there. I know I missed about three days back in there.

Q. February 16, 1968, you only worked 36-1/2 hours—excuse me, I have you confused—31 hours?

[63] MR. WALSH: I can't buy this, I am sorry.

TRIAL EXAMINER: Excuse me, counsel. Just what are

you after, just where are we going. I don't follow what you mean by this.

MR. JONES: This is impeachment for one thing. He testified he was only laid off maybe two times prior to this matter of the union coming up.

TRIAL EXAMINER: Your questions do not indicate layoff, Mr. Jones. The witness could have been sick, the weather could have been bad, any number of things.

MR. JONES: I am giving him an opportunity to explain it.

TRIAL EXAMINER: Your question doesn't give him an opportunity to explain anything. Your questions were did you work so many hours. The witness, as we can see, has nothing before him. I don't know if he has check stubs or anything he can verify it with, whether he kept a daily record. I am sorry to say that what you are asking really doesn't have any bearing, it doesn't help. If all you are intending by this is to show that he didn't work 40 hours every week, so what. There could be any number of reasons, and this is not going to aid us in that. What he is testifying to is that he was laid off for a period of several days in previous times, but whether he worked 32 or 34 hours a week doesn't show us that.

MR. JONES: It seems to me it would shed light on it.

[64] TRIAL EXAMINER: Would you tell me how?

MR. JONES: Well, it shows that they had never worked regularly down there, 40 hours a week every week. So the fact they are laid off once in a while now is not important in light of that background.

TRIAL EXAMINER: Counsel, as I said, that still doesn't show me anything. If you want to show me a record of layoffs, that might be something different. This is not a record of layoffs, this is a record of hours. A record of hours would only mean he worked so many hours, whether it was because they didn't have work, the man was sick, whether he had taken leave from the company, whether the weather was inclement so they could not work, I don't know, and what you are telling me doesn't show me that. If you have a record which shows layoffs during this period, that would be something different.

MR. JONES: Let me ask the witness a question this way.

TRIAL EXAMINER: All right.

Q. (By Mr. Jones) Isn't it true that you did have layoffs?

back prior to this union activity occasionally because of slack work?

A. Before March 15th?

Q. Yes.

A. Yes, I was laid off occasionally.

Q. Because of lack of work?

A. That is what Bob [65] Scrivener said, yes.

Q. And both you and the other men also?

A. I don't know about the other men, I know about me.

Q. You do not know whether or not they worked when you were laid off back before March 15th?

A. Not for sure.

Q. Isn't it true that at one time when all the men were in Mr. Scrivener's office, and you tell me the date, that all the men signified they wanted to join District 50, and that was communicated to Mr. Scrivener there when everyone was present?

A. Yes, when I asked each one of them.

Q. What date was that?

A. March 15th?

Q. On March 15th, when all the men signified to Mr. Scrivener they wanted to join District 50—

A. (Interrupting) I didn't mention any union there at the time, I just said if they wanted to join the union, not which one.

Q. You did not mention District 50 to any of these men?

A. Not that I remember.

Q. I talked to you the other day, didn't I, while investigating these charges?

A. I told you I was not clear on stuff that happened three months ago.

[66] Q. You told me, did you not, that you asked these men if they wanted to join District 50?

A. No, sir.

Q. And that they told Mr. Scrivener they did, and that they never told him they would never change their minds?

A. No, sir, I never said that. I asked them if they wanted to join the union, I did not say District 50.

Q. Do you remember when I was talking to you I wrote down everything that we covered, didn't I?

A. Yes, but I didn't sign it.

Q. You didn't sign it but you read it over, didn't you?

A. No, sir.

Q. You did not read this statement over and I asked you to sign it, but you said you did not want to sign it? I did give you the opportunity to read it over?

A. I do not remember reading it.

MR. JONES: Would you mark this Respondent's Exhibit No. 5.

(The document aboved referred to was marked Respondent's Exhibit No. 5 for identification.)

Q. (By Mr. Jones) I will show you a document, a seven-page document, marked Respondent's Exhibit No. 5, and ask you if you recognize that as being the statement that I wrote down covering our conversation when I was out there on the date indicated there, and I would like for you to take time to read through it and see if accurately reflects [67] the conversation that you and I had on that date.

A. You asked me if I would read it and sign it, but I did not have to sign it.

TRIAL EXAMINER: The question before you is simply whether you read it or not.

THE WITNESS: No sir, I did not read it.

Q. (By Mr. Jones) I would ask you to read through that document and see if it accurately reflects the entire conversation between you and me on the date indicated thereon.

TRIAL EXAMINER: Let me ask a question before we get into this. I do not want to be put in the position, counsel, of having this witness pick apart everything, to say whether you said this and to say whether this is accurate. That is not going to help me in deciding credibility, and I think this is the direction in which you are headed. I do not want to get into a question of credibility between you and this witness, and this is what you are asking me to get into.

MR. JONES: I don't know of any way to avoid it.

TRIAL EXAMINER: I want you to find a way, because—

MR. JONES (interrupting) I strongly believe we should have depositions, and we don't have that. These are the techniques that are available to me.

TRIAL EXAMINER: All right, are we going into the position that if this witness—that you are going to want to [68] come up here and testify that this is not accurate?

That is what I don't want to get into. This seems to be the direction in which you are headed, and I don't want to.

MR. WALSH: I would like to make a representation on this matter. In the first place, I would object to the use of this document. It is an unsigned statement. The witness said he didn't read it. Mr. Jones took the statement from Mr. Smith. He, Mr. Smith, asked me whether or not he should sign it or not, and I satisfied myself that Mr. Jones had not done this properly. I told him that it was his choice, I said, "I want you to make sure you read it and understand it before you sign it." Now, the witness tells me Mr. Jones never followed up on it and never recontacted him.

MR. JONES: I was afraid—I can't ask him if he gave a statement to the Labor Board, and I did not ask that question. It is illegal to ask that question. He brought it up several times and I was not about to ask him for a copy of the statement.

MR. WALSH: My point is Mr. Jones never followed this up at all. It is improper under any circumstances unless Mr. Jones is willing to testify.

TRIAL EXAMINER: This is the point that I am going to try to avoid, very thoroughly try to avoid. The only way we can go from here is either the witness says everything I said to you during that interview is here, and

[69] I don't know whether he is going to say that or not. The other thing is, if he says it isn't, then we are going to be in a position of denial of the questioning by you, with the only way to resolve that, which would be to your benefit, which would be for you to get up on the stand and testify that what he says is wrong. Then we get into the matter of what was said in the interview, and that is something I do not have to decide and I am not about to get into it. It is not going to help me.

MR. JONES: I understand that part.

TRIAL EXAMINER: That is the point we are at now, because if we go further we are asking this witness to read this statement. Presumably you are not going to stop at that point. You have already indicated on the record you are going to ask him whether it correctly reflects what was said in the interview. This is the doorway I do not want to enter, because it is not going to help me resolve the credibility of this witness.

MR. JONES: Even if he admits that that accurately reflects the interview?

TRIAL EXAMINER: There are one of two answers, either it does or it doesn't. If it doesn't, does that help me? If it does, how does that help me?

MR. JONES: If it does we certainly can go in, for impeach [70] ment or any other purpose.

TRIAL EXAMINER: Rather than have the witness read through it and for you to get to that point, if you want, you may ask him some questions as to what you recall of this and ask him if he agrees. Then we can get to that point that way. I think that would be a more proper way of doing it. Counsel, please bear in mind that prior to this time I think you have asked some question and I think you were referring to that document, about whether he said something about District 50, and if that was in there, as you seem to indicate from your questions, I am not saying that is so, then you already have it, a denial, to a certain extent of your conversation.

MR. JONES: Your Honor, I think I will just make an offer of proof, that if this witness were permitted to answer the question which I asked him, which is, does this statement, Respondent's Exhibit No. 5, accurately reflect the full conversation between he and myself on the 18th day of June, 1968, I would offer to prove that he would say it does.

I want to offer this statement as Respondent's Exhibit No. 5 for the purposes of impeachment.

TRIAL EXAMINER: Counsel, first of all, unless you have a reasonable basis upon which to make an offer of proof I will have to deny it. Now, having asked the prior questions you have asked, and there seems to me to be a doubt, from what you said and from what the witness said, that what apparently is in this statement is [71] true, I don't see how I could take this as an offer of proof.

An offer of proof is something that you are prepared to prove, that the witness will state thus and so. And from the prior questions and answers I do not know that I could do that, could I. You have asked some questions, and I thought you were taking something from this document in regard to whether this witness told you that he asked the men if they wanted to join District 50, and the witness has said no. Now, if that is what is contained in here then I could not possibly take that as an offer of proof, could I?

MR. JONES: In the first place, I did not read from it directly before.

TRIAL EXAMINER: Whether you read from it directly or not, is that substance in there? Your question was, didn't you tell me this.

MR. JONES: Yes; and I believe he admits that he signed this statement.

TRIAL EXAMINER: That he signed the statement?

MR. JONES: That this is the substance of the statement he gave me. I put down every word just like he told me.

TRIAL EXAMINER: Counsel, maybe you misunderstood me. My question to you was this: Just a few moments ago you asked a question about whether or not he told you—

MR. JONES (interrupting): Yes.

[72] TRIAL EXAMINER (continuing): —he said to the people that evening, asked them whether they wanted to join District 50, and he said no. Now, is the substance of that in this? If it is, and the witness having given that answer, I do not think I can take it as an offer of proof, because you are really not prepared to prove it, having gotten a negative answer to that question. Do you see the point I am making?

MR. JONES: Yes, I do, but I think I am entitled to make an offer of proof of that kind. I may be wrong, but I feel as if I am.

TRIAL EXAMINER: Is this the way you want to leave it?

MR. JONES: Yes, I want to leave my offer of proof standing.

TRIAL EXAMINER: Your offer of proof is rejected, and I will reject the document itself. If you want it to be placed in the rejected file we will have it in the rejected file.

MR. JONES: I will wait and see what develops.

TRIAL EXAMINER: All right.

(The document above referred to, heretofore marked Respondent's Exhibit No. 5, was rejected.)

Q. (By Mr. Jones) You testified, did you not, Mr. Smith, that you and Bob Scrivener had discussed District 50?

A. On March 15th.

Q. And on that same date you and the other employees were in the office of the company?

A. Yes, sir.

[73] Q. And you asked the other employees, in front of Mr. Scrivener, if they wanted to join District 50, did you not?

A. No, sir.

Q. Or if they wanted to join a union?

A. I asked them if they wanted to go union.

Q. And they said what?

A. I asked each of them and they said yes or shook their heads for yes.

Q. At any time prior to that had you ever discussed any other union with Mr. Scrivener besides District 50?

A. No.

Q. So what did you state to Bob Scrivener after you had asked these other men whether they wanted to go union?

A. I said, "Bob, there it is."

Q. There what is?

A. The men agree.

Q. To what?

A. To go union.

Q. Which union?

A. I didn't say.

Q. Did you ever tell Bob Scrivener directly that the men decided they did not want to go into District 50, that they wanted to go in another union?

A. I never told Bob anything about it.

[74] Q. All you said was, "There it is"?

A. "There it is".

Q. Now, Mr. Scrivener did not poll each individual employee as to the matter of whether they wanted to go union or not?

MR. WALSH: I object. It calls for a conclusion, I believe.

TRIAL EXAMINER: Rephrase the question as to whether or not Mr. Scrivener asked that question.

Q. (By Mr. Jones) Did Mr. Scrivener, at this time, ask the men whether they wanted to go union or not?

A. He was there and after all of them agreed to go union he said he would check with District 50, either write them a letter or go see them.

TRIAL EXAMINER: The question to you was whether Mr. Scrivener, at that point, asked the men whether they wanted to go union or not.

THE WITNESS: No.

Q. (By Mr. Jones) Did he ever say or do anything to indicate he was going to put pressure on anyone to join or not join the union at that time?

A. No.

Q. Well, was he leaving it to the individual choice of each man?

A. Yes.

MR. FRANCKA: I object to that as being argumentative.

[75] TRIAL EXAMINER: It is a conclusion, I will sustain the objection, counsel.

Q. (By Mr. Jones) Mr. Scrivener did tell you, on the evening of March 19th—was it March 19th when I was out there with Mr. Scrivener, what was that date?

A. It was the 19th.

Q. At that time Mr. Scrivener did say he would ask Jack Moore if he would still be able to use his own men if he signed the contract with the I.B.E.W., that Jack Moore had told him he would have to use whomever Moore sent to him, didn't he say that at that time?

A. On the 19th, at the apartments?

Q. No, when I was present.

A. Yes.

Q. Mr. Scrivener made that statement to you then?

A. He made it quite a few times about that.

Q. That he had asked Jack Moore if he signed the contract with him if he would still be able to use his own men, and Jack Moore told him no, he would have to use whomever he sent him?

A. Yes.

[77] TRIAL EXAMINER DYER: On the record.

In an off-the-record discussion that was just held, I am informed by counsel for general counsel that apparently there has been some misunderstanding between him and counsel for the Respondent as to just what amounts can be agreed to in regard to the legal jurisdiction application here. Counsel for the General Counsel understanding that something could be done and counsel for the Respondent not understanding and agreeing to such, in any event, General Counsel informs me that he now has issued a subpoena to Respondent, Mr. Scrivener, concerning records. Also, through proceedings through his office, he has proceeded locally through the Graybar Company to ascertain the exact amounts and is proceeding through the Regional Office to do so.

The question as to the amount has been raised and it

has been cited to me that what the Board has regarded to be legal jurisdiction and there appearing what could be gathered from an assumption of what Graybar brings in, that there probably is legal jurisdiction. Without deciding such a point, it appears to me to be a better course, at this point, to proceed with the case and allow General Counsel to bring in this matter at a later time.

I understand from General Counsel that by late this afternoon he hopes to have a final answer on this, is that correct?

[78] MR. WALSH: I believe that is correct, Your Honor. I'll know what has been arranged to comply with this subpoena I issued. I am sure it will be by tomorrow because the records are in Kansas City.

TRIAL EXAMINER: On those assumptions, I think it is in the best interests of all to proceed at this point and let General Counsel put in his case without concluding the matter of jurisdiction. It would be less time-wasting for all concerned if we were to proceed at this time.

Are there any objections to our proceeding at this time?

MR. JONES: Your Honor, I just want to say this, I don't think there was a misunderstanding as to what the agreement was. I want to be accurate on this. Mr. Walsh thought I had agreed to stipulate to that jurisdiction.

MR. WALSH: Not that you had actually agreed to stipulate to it, but I think I told you from the way it looks to me and through changed circumstances, I will be unable to prove jurisdiction. I think I told you my theory and you said that it sounds reasonable. You said you would talk to your client, that it sounds reasonable and you would see what you could do.

MR. JONES: Yes, I said I would see what I could do.

TRIAL EXAMINER: In any event, gentlemen, what either of you thought each of you said, it apparently wasn't so. There is a misunderstanding as to what was to be agreed upon. There is no understanding now as to the dollar amounts. I have an under [80] standing there will be some evidence coming forth in the near future. As I said earlier, it looks as though presumably the purchases from Graybar would amount to more than \$1500 of out of state goods. Therefore, on that basis, we will proceed at this time.

MR. WALSH: Very well.

MR. JONES: Your Honor, not burdening the record, it is

my understanding that there is no 8(a)(4) violation found, even if we have legal jurisdiction and the case would go out, the 8(a)(4) is the only theory on which we are trying, the Board is requesting certain jurisdiction.

TRIAL EXAMINER: Well, as I understand it this time, General Counsel is basing his contentions primarily on the case of Philadelphia Moving Picture Machine Operators versus Iacobucci on the basis that where the Board's investigative process has been impeded, that the Board will take legal jurisdiction without the discretionary standards being shown. I, therefore, take it that it is on that basis that the allegations in the complaint are made in regard to paragraph 4(d) and paragraph 5(c) are the basis primarily of General Counsel's theory for assertion of jurisdiction.

MR. WALSH: That is why the General Counsel felt it should issue a complaint because of the present status of the law, but I don't think that I was by myself. Mr. Franks thought the Board should take notice of this case anyway. I don't know of a case [81] where the Board has taken exception to this because of outrageous conduct or violations.

TRIAL EXAMINER: You have one line of cases going now. I am not saying that you could not propose a theory that we wouldn't find, but in the same way that the Board took jurisdiction in the prior proceeding where Respondent refused to give any commerce information, so I cannot bind the Board as to what the Board will take jurisdiction on. All I can do is hear the evidence and make the recommendation. They may go along with what I say and they may reverse what I say. The Board, in the end, will make up its own mind as to whether there is jurisdiction or not.

MR. JONES: I was going to say that if that is the only theory they are going on, we could perhaps shorten it.

TRIAL EXAMINER: I do not want to tell General Counsel how to try his case. I presume he has it laid out and I will go ahead and let him lay it out. I understood from the previous discussion with you gentlemen that he felt possibly he could finish this afternoon so let's go ahead and see what we can do.

We are back at the point where you are on cross-examination.

MR. JONES: Yes.

TRIAL EXAMINER: Off the record.

V

(Discussion off the record.)

[82] TRIAL EXAMINER: On the record.

CROSS-EXAMINATION

Q. (By Mr. Jones) The night of March 19th, I believe you said, was the afternoon that I was out there with you and Bob Scrivener. Do you recall what Bob said when he gave you your check that night?

A. Well, I asked him if he was still going through with it, and he said yes. He said that he would give us the checks.

Q. Now, Mr. Smith, wasn't that after he told you that Jack Moore had told him that he couldn't use you men if you signed a contract with them, that he couldn't necessarily use you and that he would have to use who Jack would send him and call him?

A. I don't remember exactly if that was it.

Q. Let me ask you, prior to March 15th, had you ever worked through the union hiring hall in Springfield?

A. No.

Q. Now, after Mr. Scrivener gave you your check on the evening of March 19th, didn't he tell you to come back to work in the morning if you wanted to?

A. You say the 18th?

Q. I believe it was the 19th, wasn't it? Didn't he tell you to come back and work the next morning if you wanted to?

A. That's right.

Q. Didn't he tell you all that the reason he was giving you the check—did he tell you the reason he was giving you the [83] check?

A. Which time?

Q. When he gave it to you on March 19th.

A. The 19th? He just wanted to know if we was going to go through with it?

Q. Didn't he tell you that he wanted to let you all have freedom to choose for yourselves where you wanted to work, that you could work through the hiring hall if you felt you could get a better deal or you could continue working for him, that he wanted you to work for him?

A. Well, he gave us a choice there, whether we wanted to go to work for him or his letting us go.

Q. In other words, when he gave you your check, did he explain to you that he was giving you that check so that you would not feel obligated to work for him the next day if

you thought you could get a better deal through the hiring hall, but that you were still free to come back the next day and work for him as usual?

A. He said we could come back after we took our checks the next day.

Q. You received a letter dated March 22, 1968, which was a Friday and you say you got it on the next Monday, the 25th.

A. Right.

Q. Don't you get mail on Saturday?

A. I don't know what happened, but I did not get that letter until Monday.

[84] Q. I don't know whether you have identified this or not. Respondent's Exhibit 2, is this a copy of the letter that you received?

A. Yes.

Q. Since receiving that letter, you went back to work the next day after you got that letter, didn't you?

A. I went back when I got the letter, yes.

Q. Since receiving that letter, has Mr. Scrivener ever mentioned anything about the union to you?

A. No. He might have mentioned something, but I don't remember.

Q. Did he ever at any time after you received that letter make any threats to discriminate against you in any way?

MR. WALSH: I object.

TRIAL EXAMINER: Sustained. Threats to discriminate in any way is a legal conclusion.

MR. JONES: I don't know how else to ask it but negatively.

TRIAL EXAMINER: The words themselves indicate a legal conclusion.

Q. (By Mr. Jones) Did Mr. Scrivener, after you received that letter, Respondent's Exhibit 2, ever say anything to you in regard to any action he would take against you if you persisted in joining the union?

A. After receiving that letter?

[85] Q. Yes.

A. No.

Q. In fact at one time, didn't he say, "Well, I don't blame you for joining a union", didn't he tell you that once?

A. He said he don't blame me for bettering myself.

Q. Didn't he say, "Well, I don't blame you for joining a union"?

A. Well, I knew—he said he don't blame me if I could better myself.

Q. But you don't remember that statement that I quoted there?

A. No.

TRIAL EXAMINER: Counsel, let me ask a question at this point. You seem to be referring to a statement of some sort. Is this what has been marked as 5?

MR. JONES: Yes.

TRIAL EXAMINER: All right. I think we discussed this at length earlier and this is the same statement that I have rejected on your offer of proof. You are now using it in a different way?

MR. JONES: Yes.

TRIAL EXAMINER: Well, I think what you are doing now, and from the answers you are getting, it is indicating why I rejected the offer of proof.

Q. (By Mr. Jones) You were laid off how many times after you received that letter, Respondent's Exhibit 2?

A. Once.

[86] Q. Once? At that time, did Mr. Scrivener state to you the reason for the layoff?

A. I would like to make a correction on that, it was twice. It was on the 27th and then on the 18th.

Q. All right. On each of those occasions, did he state the reason for layoff?

A. He said it was a lack of work.

Q. Did all of the people who signed up for the union get laid off at the same time?

MR. WALSH: I have to object to this form of questioning, Your Honor.

TRIAL EXAMINER: Do you want to designate some particular group or what?

MR. JONES: Well, he has been present when the testimony was given about five cards. I am referring to those five individuals whom the testimony shows apparently signed the cards.

Q. (By Mr. Jones) Were all of those five people laid off when you were laid off?

MR. WALSH: I object to the question because he has already testified he was laid off several times. I didn't think there was any dispute over the fact of these occurrences. I thought we had a stipulation to that.

TRIAL EXAMINER: I'm not sure what layoff you are talking about either.

[87] MR. JONES: I really was talking about all of them. I was going to let him answer as to any specific one.

TRIAL EXAMINER: I don't know how he can answer to any specific one unless you tell him which one you are talking about.

MR. JONES: All right.

Q. (By Mr. Jones) You say you were laid off twice since receiving that letter on March 22nd. The first time was on March 27th, I believe you said.

A. That's right.

Q. At that time, who was laid off along with yourself?

A. Albert Wilson.

Q. Albert Wilson? What about any other men who signed cards? Was Donald Cockrum laid off then?

A. Just Albert Wilson and myself were the only ones laid off on the 27th. There was Albert Wilson, Bill Cockrum and myself on the 27th, that second time.

Q. All right. Weren't there other men who signed cards working besides those three?

A. Not at that time.

Q. There were not more than three who had signed cards for the union?

A. Well, those were the ones who were laid off.

Q. If there were five who had signed cards for the union and only three were laid off?

A. That's right.

[88] Q. What about the next time you were laid off, who else was laid off then and give us the date of that layoff.

A. That was April 19th.

Q. Who else was laid off then?

A. Claude Sanders and I believe Don Cockrum, Albert Wilson and myself.

Q. Isn't it a fact that work was slow at those times when you were laid off, that the work was pretty well caught up?

A. Well, I don't know, I just don't know what comes in the shop.

Q. Mr. Scrivener has never directly or indirectly asked

you about any statements that you gave to the N.L.R.B. or any of its agents, has he?

A. No.

Q. You don't know of his asking anyone about such matters, any of his employees?

MR. WALSH: I object to that. I think that is an improper question.

TRIAL EXAMINER: Well, I don't know how that question could help in any way. Whether he knows it or not is not material.

MR. JONES: All right, I will withdraw it.

I believe that is all.

[89] TRIAL EXAMINER: Any redirect?

MR. WALSH: No, I don't have any.

TRIAL EXAMINER: I have one or two questions.

Q. (By Trial Examiner) During your examination at one point, you were talking about Mr. Scrivener talking to you on the phone and you named three contractors. Can you tell me what type of contractors those were? Are they primarily residential contractors or do they also do other work?

A. They are non-union.

Q. They are non-union contractors?

A. Yes.

Q. Were they primarily in the same field Mr. Scrivener is in?

A. Yes.

Q. All right. One other thing, you mentioned names when you went back to work on March 26th that Clyde Hunt and Jim Statton were working for the company. Do you know whether they were kept on after you were let go on the 27th?

A. Yes, sir.

Q. How do you know that?

A. Well, when I went back to work April the 1st, they were still there.

Q. Is there any way you know they worked in the interim or not?

A. No, sir, I do not.

[90] Q. You were not out on any job and saw them there?

A. No, sir.

Q. But they were there on April 1st?

A. Yes.

Q. Were they there continuously after that time?

A. Yes.

TRIAL EXAMINER: That's all I have.

Anything further, gentlemen?

MR. JONES: That's all.

MR. WALSH: No.

TRIAL EXAMINER: Thank you.

• • • • •
BILLY A. COCKRUM

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as [91] follows:

TRIAL EXAMINER: State your full name and address, please.

THE WITNESS: Billy A. Cockrum, 1629 South Oak Grove, Springfield, Missouri.

DIRECT EXAMINATION

Q. (By Mr. Walsh) Mr. Cockrum, have you ever worked for Bob Scrivener?

A. Yes, I have.

Q. When did you first start working for him, Mr. Cockrum?

A. Approximately the first of February.

Q. Of 1968?

A. Yes.

Q. What was your job with him?

A. Journeyman electrician.

Q. Did there come a time when you were discharged?

A. Yes.

Q. By Mr. Scrivener?

A. Yes.

Q. What was the date of your discharge?

MR. JONES: I object to the leading nature.

TRIAL EXAMINER: This is in the preliminary. I don't think the question is leading as such to that degree, counsel, that I would base credibility findings on such a question. In fact, I don't think it is really leading.

Go ahead.

[92] Q. (By Mr. Walsh) What was the date of your discharge, Mr. Cockrum?

A. March 19th.

Q. Between the time that you started working there and until March 19th, how much work did you miss?

A. I don't think I missed a day.

Q. Mr. Cockrum, did there come a time when you heard some talk at the shop about a union?

A. Yes.

Q. Will you tell us how this came about?

A. On March 15, I believe, Wesley Smith, George Wesley Smith, came into the shop. Bob Scrivener told us he wanted us to wait, that Wesley Smith had something he wanted to say to us so we waited on Wesley. He wanted to know if we wanted to join the union.

Q. Who wanted to know this?

A. Wesley, Wesley Smith.

Q. Who was present at this time?

A. Wesley Smith, myself, Don Cockrum, Bud Wilson and Sanders.

Q. Was Mr. Perryman there?

A. Yes.

Q. And Mr. Scrivener?

A. Yes.

Q. Tell us what Mr. Smith said.

A. Wesley came in and he just asked us if we wanted to join the union. I hadn't been [93] there but just a short time. I think I said something about going along with the men, but I couldn't say because I hadn't been there in the shop long enough. So, then, he told Bob, he said, "Bob, there it is." Then Mr. Scrivener said that he would check into it or go up if he had to and see about District 50. Then he said he knew some shops that was District 50, there was Rowland.

Q. R-o-w-l-a-n-d?

A. That's right, Rowland Electric. Another one he thought was Econo Bright Electric Company. Then he named some other businesses which I didn't pay any attention to, I'm not in the electrical.

Q. After this meeting, did you have occasion to discuss this topic any further with Mr. Scrivener?

A. Well, yes, I called Mr. Scrivener on the phone that night and asked him why or what he thought about Electrical 453. He said that he just wouldn't join Electrical 453 at all, that at one time he had had a card and had

vacated it and went back to get it from Moore. I think they said his card had been revoked or something and he didn't have a card.

Another reason he said that NECA, the 2 per cent, that he could not afford to belong to NECA. So I dropped the subject there and I called Mr. Edwards this same night, Ray Edwards.

Q. Ray Edwards?

A. I called Ray Edwards and I [94] told him the situation. I asked him if the boys wanted to go 453, if they would consider taking us into Local 453 and to represent us.

Q. Did you set up a meeting with Mr. Edwards at that time?

A. Yes, let's see, no.

Q. Well, tell us what happened.

A. I think I set the meeting up—I don't know whether I set it up right then or not or talked to Mr. Moore. I don't know whether I set it up with him or Mr. Moore, but it was on the 18th when he had the meeting.

Q. You did have the meeting at the union hall, is that correct?

A. Yes.

Q. Who was present at that meeting?

A. Myself, Don Cockrum, Bud Wilson, Wesley Smith and Sanders.

Q. What union officials were there?

A. Jack Moore and Ray Edwards.

Q. Mr. Cockrum, I want to show you what has been marked for identification as General Counsel's Exhibit 3-A and ask you if you have ever seen that document before.

A. That is an authorization slip that I filled out and give to Mr. Moore, that he would—this is authorizing him to represent me.

Q. You filled it all out, dated and signed it?

A. Yes.

[95] Q. What did you do with it after you filled it out and signed it?

A. I gave it to Mr. Moore.

MR. WALSH: I offer this into evidence, General Counsel's Exhibit 3-A.

TRIAL EXAMINER: Any objections?

MR. JONES: No objections.

TRIAL EXAMINER: General Counsel's Exhibit 3-A is received.

(The document above referred to, heretofore marked General Counsel's Exhibit 3-A, was received in evidence.)

Q. (By Mr. Walsh) Now, you said you signed this card at the union meeting on March 18th, is that correct?

A. Yes, I believe that's right.

Q. At the union hall?

A. Yes.

Q. All right. Tell us what happened at work the next day.

A. Well, I went to work the next day and that night when we went in, Mr. Scrivener's attorney was present.

Q. What was that?

A. I can't think of his name.

Q. Mr. Jones sitting here?

A. Yes, Mr. Jones.

Q. All right.

A. He was telling us about, you know, the local. He said that the initiation fee was high, I think \$300, [96] and something or other, that Mr. Scrivener hadn't made \$50. Supposedly a piece of paper that was supposed to be his income tax that had been sent in and he hadn't made enough money to be taken in.

Q. Taken into what?

A. Taken into the local. Other than that, there wasn't too much said. He wanted to know how many of us were going to stay with Local 453 that had signed the card and I told him I was. He went in and got all of the checks and brought them out.

Q. Whose checks did he get?

A. He had a number of checks in his hand when he came out, filled out. I told him I was going to stay with 453 and he handed me my check. I asked him if I was fired and he turned to Mr. Jones, his attorney, Bob Scrivener's attorney, and asked him what he should do and he said, "Well, I think it is best to let him work out of the hall." So Bob shook his head yes. So I started toward the car and Wesley Smith and Bud Wilson had taken their checks and had started to their car and Bob walked in back of the shop and said that if we wanted to work the next day that we could, that we

could come back out to the next day which we did. That was the 20th and we went to work the next day, got our material out to go on the jobs and Bob said that there was one thing that his attorney wanted to know before we went on the jobs. He said he wanted to know if we were [97] affiliated in any way with 453. We said we was and he said that he could not use us.

Q. So, then, did you leave again?

A. Yes.

Q. Did you ever work for Mr. Scrivener after that?

A. Yes. I received a letter—

Q. (Interrupting) Did you get this letter which has been marked as Respondent's Exhibit No. 2, this copy of it, did you get a letter like that?

A. Yes, I did.

Q. All right. What did you do after you got that letter?

A. I got it on the 25th and I went to work on the 26th and the 27th. On the 27th, that night before quitting time, I was laid off. Well, I wasn't laid off, they were going to draw straws and I told Mr. Scrivener to draw mine.

Q. You lost, is that correct?

A. Yes.

Q. Have you heard from Mr. Scrivener since?

A. No, sir.

Q. You say you are a journeyman electrician, is that correct? That's right.

MR. WALSH: That 's all I have. I don't have a statement from this witness, Your Honor.

TRIAL EXAMINER: Do you have any questions?

MR. FRANCKA: Yes, one or two, Your Honor.

[98] DIRECT EXAMINATION

Q. (By Mr. Francka) The evening of the 19th when you were laid off, was Mr. Scrivener present during the various conversations that were had when Mr. Jones was making the various statements to you?

A. Yes, he was present.

Q. He indicated to you that he was his attorney? Did he indicate that at any time during the course of the evening?

A. That's right.

Q. Did either Mr. Scrivener or Mr. Jones make any statements about District 50 on that occasion?

A. Not to my knowledge.

Q. What about any statements particularly about Local 453 of the IBEW?

A. Yes, they did. He said that he said—

Q. (Interrupting) Who said, Mr. Jones or Mr. Scrivener?

A. No, Mr. Jones was talking about 453, the initiation fee being \$300 and that is about all. Then I told him that it was not \$300 and he said, "It must be the sheet metal workers." That's about all.

MR. FRANCKA: I have no more.

TRIAL EXAMINER: All right. Mr. Jones?

CROSS-EXAMINATION

Q. (By Mr. Jones) Isn't it a fact that I said I didn't know what the IBEW initiation fees were, but that I knew in the Con- [99] gressional investigation of the Sheet Metal Workers, the then Senator Kennedy who was later President, that they were complaining about the sheet metal workers dues and the initiation fee being equal to 100 hours of employment. If a man was making \$4.50 per hour, it would be \$450. Didn't I say that about the sheet metal worker?

A. No, that was not the way you phrased it.

Q. When I was talking about the Congressional investigation of the McCullen Committee and how I had read that hearing and how when Senator Kennedy and then President had the I can't understand her at all of those exorbitant fees, don't you remember that?

A. That part I didn't remember. The part I remember is that part where you said 453 charges, \$400 initiation fee, and I told you that they didn't. You said that it must be the sheet metal workers.

Q. Have you talked to Mr. Tyrus Frerking of the Labor Board?

A. Yes, I have.

Q. Did you sign a statement for him?

A. No, I didn't have to sign a statement. He had four statements and it was late and I did not sign a statement.

MR. WALSH: Mr. Examiner, it occurs to me I've got some notes I took when I talked to him the other night. I have same notes that I will let Mr. Jones look at. I don't know, I have heard that notes you take for an interview are a part of the material [100] you are supposed to enter.

TRIAL EXAMINER: I'm not called on to rule on it. If you want to hand him notes, go ahead.

Q. (By Mr. Jones) Did Mr. Tyrus Frerking also take notes when he talked to you?

A. He took notes, too.

MR. JONES: Are those notes also available?

MR. WALSH: No, I don't have those.

Q. (By Mr. Jones) Over the years, have you ever worked out of the 453 hiring hall?

A. Yes.

Q. For how many years?

A. Probably 8 years.

Q. When you go out and sign through that hiring hall, just tell the Trial Examiner how that works.

A. Well, the way I work under 453, I work under a permit and you are sent out on a job. When the job is over, you are sent back to the hall and they send you on another one.

Q. Then they handle layoffs on the basis of who was last signed in at the hiring hall?

A. That's right.

Q. When did you first start to work for Mr. Scrivener?

A. I do not know the exact date, I said probably the first part of February.

Q. Well, you don't claim that you worked a full 40 hours [101] every week prior to March 15th, do you?

A. Just about. My little boy broke his leg and I laid off.

Q. What?

A. I laid off myself.

Q. When was that, what week was that if you recall approximately?

A. I do not know the exact date.

Q. When you went to work out there, who else was employed there?

A. Wesley Smith, Bud Wilson, Boyd Perryman and Don Cockrum.

Q. Your brother, Don?

A. Yes.

Q. He was working there before you were?

A. Yes.

Q. He is your brother?

A. Yes.

Q. Mr. Scrivenery never said anything to you about talking to any agent of the Labor Board, did he?

A. Not to my knowledge, no.

MR. JONES: I believe that's all.

TRIAL EXAMINER: Anything further?

[102]

RECROSS-EXAMINATION

Q. (By Mr. Jones) Isn't it true that on the afternoon of March 19th when Bob Scrivener gave you your check, didn't he explain to you the reason he was giving your check then?

A. I asked Bob Scrivener when he gave me my check if I was fired and you were standing right beside me. He turned to you and asked you if or what should he do. You told him that you felt that I should go to the hall and work out of the hall. Mr. Scrivener shook his head yes.

Q. Now, let me ask you if this isn't the way it was. Isn't it true that Bob had told you all earlier, before that or anything of that nature came up, that he wanted you boys to be able to better yourselves by working through the union. If you thought you could do better somewhere else, he wanted you to be free to [103] work somewhere else. He also wanted you to be free to work for him if you wanted to, don't you recall that?

A. I don't recall it like that, no.

Q. Don't you recall that the statement I made was along that same line? If they thought they could do better somewhere else and you want to let them work somewhere else, why, that's fine as long as you permit them to work here regardless of whether they are for or against the union.

A. Well, when I got my check was when I asked him. I wanted to know whether or not I was fired and Mr. Scriyener in the garage turned to you and asked you what he should do. You told him it was better to let him go to the hall and let him work out of the hall, is what you told him.

Q. I told him if the boys thought they could better themselves somewhere else and he wanted to let them do it, as long as he didn't discriminate against them or hold it against them for belonging to the union.

A. I don't remember it that way.

Q. All right. Later, then, after you went out to go home,

do you admit that he turned around and told you to come back in the morning if you wanted to?

A. The next morning, yes.

Q. He didn't say to come back only if you decided not to go for the union; did he?

A. No, not that night.

[104] Q. The next morning, isn't it true, he told you boys that you were free to work there if you wanted to, but he did not want you to get in trouble with your union for working for a non-union contractor. If you felt like you were going to get in trouble with your union for working with a non-union contractor, he wouldn't hold it against you.

A. That's not what he said. He said if we were still affiliated with Electrical 453 that he could not use us.

Q. You are familiar with Local 453's by-laws and constitution, aren't you, having worked under the work permit?

A. I have worked under the permit, yes. I know most of them.

Q. You are familiar to some extent with the rules and regulations?

A. Yes.

Q. Isn't it true under those rules and regulations that it is a violation for a member of that union to work for a non-union contractor?

A. That would be so, but I was not a member of Local 453, I was on a permit. Local 453, at the time I went to work for Mr. Scrivener, didn't have the work and I verified that it would be okay to go to work for Mr. Scrivener or somebody that I got a job from.

Q. You never told that to Mr. Scrivener on the 20th, did you?

A. The morning of the 20th? This was when I first went to work for Mr. Scrivener. Before I went to work for him, I went to see if it was all right with the union so I went and got [105] myself a job. I don't think that 453, if it's a permit man, would want to hold you there on a permit, not working.

Q. I say you did not tell Mr. Scrivener on the morning of the 20th that it would not be violating union rules if you went to work for him, did you?

A. No, sir.

MR. JONES: I believe that's all.

MR. WALSH: No more questions.

ALBERT WILSON

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated and state your full name and address, please.

THE WITNESS: Albert Wilson, Route 6, Box 622, Springfield, Missouri.

DIRECT EXAMINATION

[106] Q. (By Mr. Walsh) Mr. Wilson, have you ever worked for Robert Scrivener?

A. Yes, sir.

Q. Will you keep your voice up so everyone can hear you.

A. Yes, sir.

Q. Have you worked for him for a considerable period of time?

A. I work for him twice.

Q. Will you trace your employment history with him a little for us.

A. The first time was the first part of the year. I really don't remember the month, I believe in 1965.

Q. Early 1965?

A. The early part of the year, yes.

Q. Until what time?

A. Until the early part of the next year.

Q. Then you left?

A. Then I left.

Q. That would take us, sir, until around January of 1966?

A. Yes, sir.

Q. When did you return to him?

A. The first part of the year of 1967, around February, I would estimate.

Q. Did you work for him until this time of March 18, 1968?

A. Yes.

Q. Did you work steadily for him, then?

A. Other [107] than bad days and, oh, maybe we would get in early from work.

Q. During that period of time, were you ever laid off for lack of work?

A. I don't recall being laid off for lack of work, maybe

be pretty well caught up and take a three-day weekend or something of that nature.

Q. Mr. Wilson, did there come a time in March 1968 when you heard some talk about a union?

A. Yes, sir.

MR. WALSH: Could we go off the record a second?

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

Q. (By Mr. Walsh) Tell us how you happened to hear talk about the union, Mr. Wilson.

A. Well, when we got in the shop on Friday, the 15th of March, I don't remember who was working with me, but everybody was there except Wesley and Claude Sanders. Bob asked if we would hang around for a few minutes, that Wesley wanted to talk to us. He said he could not tell us what it was about because he was not supposed to know, or some words to that effect. In probably about four or five seconds, he said, "I will tell you this much, it's about joining District 50."

In a very short while Wesley came in and in a short time he said, "What do you boys think about joining the union?" We [108] more or less all agreed that we would join. Bob said, "Well, then," oh, he mentioned I believe it was Rowland Electric and Econo Bright belonged to District 50 and they were doing real good, they weren't having any trouble to speak of. The best I can remember then, I made mention of the fact that they had a picket on Rowland Electric at the time and Bob made mention of either sending some letters or receiving some, I wasn't—

Q. (Interrupting) Sending or receiving some letters?

A. Pertaining to District 50, I don't know which it was. He said he might have to go out and find out, the wage traditions.

Q. Go up to where?

A. Kansas City. Talk went on for some time, but there really wasn't nothing much more about it.

Q. All right. After that, did there come a time when you had some contacts with Local 453?

A. Yes, sir.

Q. What date was that?

A. It was on the 18th day of March, the evening after work.

Q. Would you tell us how this came about?

A. Well, the 16th was Saturday. We were working at the apartment house on floorings. The men and Bill Cockrum decided then if we were going to get into the union that we wanted electrical.

Q. You wanted electrical work, you say?

A. Yes, [109] Bill said he would call either Jack Moore or Ray Edwards—had called them the previous night and was going to get hold of them. I believe it was Ray Edwards that he had contacted. He couldn't reach Jack Moore until Sunday and that he would probably set up a meeting for the next Monday night which, in the end result, we did.

Q. You did have a meeting on that Monday night?

A. Yes.

Q. Who was at that meeting?

A. Myself, Claude Sanders, Bill Cockrum and Wesley Smith.

Q. Were Mr. Moore and Mr. Edwards there?

A. Mr. Moore and Mr. Edwards.

Q. Were you talking union at this meeting?

A. Yes.

Q. I want to show you what has been marked for identification as General Counsel's Exhibit 3-E and ask if you have ever seen that before.

A. Yes, sir. That is a card that I filled out and signed on the 18th of March at the union hall.

Q. What did you do with this card after you filled it out and signed it?

A. I gave it back to either Mr. Moore or Mr. Edwards, I don't remember which.

Q. Did you see anybody else sign a card at that time?

A. Yes, sir. I believe I saw them all sign. I said, "I'm going" [110] to be sure to read mine" and I'm sure they all read theirs.

MR. WALSH: I offer General Counsel's Exhibit 3-E.

TRIAL EXAMINER: Any objections.

MR. JONES: No objections.

TRIAL EXAMINER: It is received.

(The document above referred to, heretofore marked General Counsel's Exhibit 3-E, was received in evidence.)

Q. (By Mr. Walsh) Did you go to work the day after you signed the union card?

A. Yes, sir.

Q. Did you have any conversation with Mr. Scrivener that day about the union?

A. Yes, sir.

Q. Would you tell us the circumstances surrounding any such conversation you had.

A. Well, we were back at the apartment house, I was working on the top floor with Boyd Perryman.

Q. All right.

A. It was approximately 10 or 10:30, something like that. Mr. Scrivener come in the apartment and looked the work over a minute or two and then said, "Bud, did you guys sign those cards at the hall last night?" I told him, "Yes." He said, "What did you want to do it for?" I said, "Bob, I thought you was wanting the union." He said, "No, no." I said, "Well, [111] you were talking District. awfully strong Monday night" or some words to that effect. He said that he just didn't want it and "You know what you guys done." I said, "We're trying to better ourselves out." He said, "Well, I've just come from the hall and you know what Jack Moore told me?" I said, "No," and he said that if we went in and got organized that he couldn't use any of us, that he would replace us with five good men. He said, "You know you couldn't go to work for another shop." He said, "I'm just telling you this for your own good." So I told him that I knew Jack Moore for several years and I just couldn't believe he said that.

During the meantime, why, Wesley Smith had came in and Boyd Perryman came in, so he said, "About the only thing I can see is he's going to have to let everybody go." He said that Boyd was the only one who hadn't signed the card.

Q. Did you say he had seen the cards?

A. He said he had saw the cards, yes, at the hall.

Q. Did you and Mr. Smith make any comment?

A. Other than saying we were going through with it.

Q. Did you see Mr. Scrivener, sir, at any other time on the jobsite that day?

A. Well, he was in and out several times, I don't remember. I know it was after lunch he come back and asked me if I had saw Doyle and I told him no. He said that

Doyle had been supposed to come by to give him a bid on what he would finish the job for.

[112] Q. Who is Doyle?

A. He was referring to Doyle Luce, the contractor.

Q. Electrical contractor?

A. Yes.

Q. Now, go on, please.

A. He told us to get everything roughed in, you know, we were just about ready to get everything finished on that part. He was just going to have to get somebody else to finish it, to load up the material, other than he named some items, wire and conduit and things that would have to be used to finish the job. We loaded everything up and took it back to the shop. He said his lawyer wanted to talk to us.

Q. Mr. Scrivener told you this?

A. Yes.

Q. Did you go back to the shop?

A. Yes, sir.

Q. Would you tell us what transpired there?

A. Well, we got back, it was early. It wasn't 4:30 and Bob said—it must have been around a quarter after 4 because he said, "I wonder where he is, he was supposed to have been here around a quarter after 4." He didn't get there till around, I would say, 25 till 5 or something like that so Bob went and called somebody. We heard him talking on the phone, to drive in a yellow car, I believe that was the color. He said, "Oh, I believe I see him pulling in [113] the drive now." He hung up and Mr. Jones came in.

Q. What happened then? Who was there so we will have it straight?

A. Mr. Jones, Mr. Scrivener, myself—

Q. (Interrupting) Yourself?

A. (Continuing)—Don and Bill Cockrum, Wesley Smith and Claude Sanders.

Q. Tell us what happened at this time.

A. Well, Bob repeated the statement that he said Jack had given him about not being able to use us five, that he would replace us with good men, that there wasn't no way that he could be forced to join 453 because he did not come under the Labor Relations Law which says you are supposed to make \$50,000 and he made less than half of that. So he went in the house—this was when we were out in the office—and brought back some little written paper. The

attorney looked it over, none of us. Then, they agreed among themselves that he had made considerably less than he had to.

Q. That he had to for what, now?

A. To be qualified for the Labor Relations Act. That was the first time I knew about any \$50,000 being involved.

Q. All right.

A. Mr. Jones went on to say that the initiation fee was \$300. Bill Cockrum said, "I'm pretty sure you are wrong, I think it is \$50." Mr. Jones said, "Well, I might be [114] thinking of the sheet metal workers." He did mention something about the initiation fee was based on so many hours and wages, but I don't remember the figure or the number of hours.

We made it pretty well known, the three gentlemen there, that we was still trying for 453 and Bob said that he had our checks then, if we wanted them or either don't fool with them. We told him we were going through with it and he went in and got the checks. I believe he only had my check and Wesley's and Bill Cockrum's, but I could be mistaken. Bill told him that he wanted it understood before he took the check that he was getting fired. Talk went on back and forth about a number of things. Bill was getting pretty hot under the collar and so was Bob and Bob turned around to the lawyer and asked him, "What would you do?" The lawyer said, "Well, I would just let him go and let Jack Moore fit him out of the hall." So Bob turned around and handed Bill his check and nodded his head, indicating, I guess, that he was fired. Then he handed me and Wesley our checks.

MR. JONES: I object and move that that be stricken.

TRIAL EXAMINER: That is a conclusion of the witness.

MR. JONES: That's what I mean, it's a legal drawn—

TRIAL EXAMINER (interrupting): It can stay on the record. I acknowledge it is a conclusion. The witness is not binding on me.

[115] Q. (By Mr. Walsh) So why don't you just tell us what you did and not what you guess.

A. Well, Bill had been asking Bob Scrivener if he had been fired and Bob nodded his head yes.

Q. All right, what did you do then?

A. Well, we all loaded up our tools, gathered up our tools

and started to the car. Bob told me and Wesley at the door, he said, "You boys are welcome to come back in the morning if you want to." Then he hollered and told Bill the same thing, that he could come back in the morning if he wanted to. So we left.

Q. You left then, is that correct?

A. Yes.

Q. Did you come back the next morning?

A. Yes.

Q. All right, what happened?

A. We got our job assignments and I do not remember, I believe I was the first to go to Republic that day, I'm not sure. Anyway, we had our tools unloaded and back on the trucks and material out for the jobs and I think Bob got a phone call about then or something, while we were getting stuff. We were just getting ready to get in the truck, I was, and I had two boys standing there and Bob said, "One other thing, the lawyer wanted me to ask you if you were still affiliated with the union." We all said, "Yes, absolutely." He said, "Well, then, I just can't use you." I told him that there was nothing to do. He mentioned he had paid the lawyer a [116] hundred and some odd dollars for his advice and he believed he should follow it. I told him that I couldn't blame him for that. So we loaded his tools up and left again.

Q. You left again, then, is that correct?

A. Yes.

Q. Did you get a letter after this time asking you to come back to work?

A. Yes, sir.

Q. Do you remember on what date you got that letter?

A. March 26th.

Q. Did you act upon that letter?

A. Yes, sir.

Q. What did you do?

A. I got in touch with the union hall and they told me that if Bob Scrivener wanted me to go back to work to go back to work.

Q. Did you, in fact, go back to work?

A. I went back to work the morning of the 27th.

Q. You are lowering your voice.

A. I went back to work the morning of the 27th.

Q. The morning of the 27th, all right.

Did you work continuously from then? How long after that did you work?

A. I worked—that was on a Tuesday. I worked that week and I called Bob up on Sunday evening and told him that I was sick, that I had the flu. I told him I wouldn't [117] be there the next day, that I would, in case he wanted to get hold of Wesley or Bill to call them in, that I would notify them.

Q. Was that Monday, April 1st?

A. April 1st was the day. I called him either that morning or the previous night and told him that I wouldn't be there.

Q. Did you go back to work then?

A. Tuesday.

Q. Did you work steadily, then, until April 18th?

A. Yes.

Q. Did there come a time when you gave a statement to Mr. Frerking of the Labor Board?

A. There was.

Q. What was the date of that?

A. The evening of the 17th of April.

Q. Where did you give him the statement?

A. The union hall.

Q. Who was at the union hall that night?

A. There was myself, Boyd Perryman—not Boyd Perryman, Claude Sanders, Bill and Don Cockrum, Wesley Smith, Jack Moore, Ray Edwards and Mr. Frerking.

Q. Who did he take statements from that night, if you know?

A. Well, he took three that I do know, I was the third statement and it was getting toward 11 or 11:30 so I do not believe he took one from Bill or Don Cockrum.

[118] Q. He did take one from you, is that correct?

A. Yes.

Q. Where did he take it?

A. In Jack Moore's private office.

Q. Was anyone else around when he took the statement?

A. No.

Q. Did you go to work the day after this event occurred?

A. Yes.

Q. Tell us, did you have any occasion to talk to Mr. Scrivener about the Labor Board that day?

A. I did.

Q. Would you tell us how this came up?

A. Well, that morning I got in to work Bob said, "Hey, Bud" and motioned me into his office and said, "Did you guys meet with the Labor Board last night?" I said, "Yes." So he said, "They sure don't talk much, do they?" I told him no, and I walked on back to get material.

Q. Did he say anything about himself having met with the Labor Board?

A. No, not right at that moment.

Q. Tell us what else happened.

A. I believe me and Don Cockrum was going out together that day. We were getting material up and Bob came up again and said, "You said you met with the Labor men last night?" I said, "Till about 11 or 11:30." He said, "That old boy sure don't tell you nothing." I said, "No, [119] Bob, he's a German." That was the end of the conversation.

Q. Did Mr. Scrivener ever indicate that he had talked to the Labor Board?

A. He said yes, the previous day, that must have been the 17th, that he had met with some men around 9 or 9:30 to around 2. It was a pretty long meeting and I don't remember the exact hours.

Q. What, if anything, happened that afternoon when you finished work?

A. We got laid off.

Q. Who got laid off?

A. Myself, Wesley Smith, Claude Sanders and Don Cockrum.

Q. How did that come about?

A. No work is what we were told.

Q. You came in after work I suppose?

A. Yes. He said if there was anything to do, he'd see what came up over the weekend and he'll call and to give him a phone number. So I gave him the phone number so he called me.

[120] Q. Were you given your checks the first time, Mr. Wilson?

A. Yes, he said—that was on a Thursday, Mr. Walsh. Let me look at this (indicating).

MR. WALSH: That's the same calendar that I gave the earlier witness.

TRIAL EXAMINER: The witness is referring to the calendar in front of him.

A. This was on Thursday, the 18th of April, and he said, "If any one of you guys want your check, to save you a trip in the morning, why, it would be all right," so we all decided to take our checks instead of making another trip to town the following day.

Q. (By Mr. Walsh) Did Mr. Scrivener have the checks in his hand?

A. No, he went into the house and got them.

Q. How long was he in the house?

A. Oh, it doesn't seem like it was over a minute or a minute and a half.

Q. And then he gave you your four checks and then you left?

A. Right.

Q. Did Mr. Perryman get laid off that day?

A. No.

Q. Did Mr. Hunt?

A. Not to my knowledge.

Q. Mr. Statton?

A. Not to my knowledge.

[121]

CROSS-EXAMINATION

Q. (By Mr. Jones) Before I forget it, I want to ask you one question. You say that Mr. Scrivener told you that he had been with the labor man the day before on April 19th?

A. No, we had a meeting April 17th and I was talking—

Q. (Interrupting) Oh, the day before that?

A. No, I was talking to him the morning of the 18th and he said that he had met with him the day before.

[122] Q. The day before from 9:00 to 12:00?

A. No, it was from the morning to way late in the afternoon.

Q. But the day before?

A. The 18th.

Q. It was the 18th of April that he met with Mr. Frerking for several hours?

A. He said labor man.

Q. It was probably Mr. Frerking.

TRIAL EXAMINER: We'll take a few minutes. You have two statements to digest and it will take a few minutes.

Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

MR. FRANCKA: I have a couple of questions of this witness. I don't care which position I take but usually I follow.

TRIAL EXAMINER: Well, why don't we take your questions and this will give counsel for respondent a chance to get loaded.

DIRECT EXAMINATION

Q. (By Mr. Francka) Mr. Wilson, directing your attention to the conversation with Mr. Scrivener in which Doyle Luce was mentioned, when did this take place?

A. At the apartment house on South Florence.

[123] Q. Is this one of the jobs you were working on?

A. Yes.

Q. What particularly were you doing on this job? What was the state of construction?

A. We were roughing in a rough conduit in the apartment house.

Q. Was it finished?

A. No, sir.

Q. What exactly did Mr. Scrivener tell you, as best as you can recall at this stage, concerning Mr. Luce?

A. Well, he just asked me casual, "Has Doyle been around yet," and I told him, "No, I hadn't seen him." He said, "Well, he's supposed to be by to give me a bid on what he will finish this job for."

Q. Did you inquire of him or was there any conversation as to why you weren't finishing it or he was finishing it?

A. That was already after the conversation we had had previously that Bob said that he would have to get somebody else to finish it.

Q. Did he give any reason at that time as to why he was having somebody else finish it?

A. Well, just the indication I had that we had signed the union cards. He was either going out of business or letting us all go. In fact, he said it looks like he would have to let us go.

[124] Q. Now, in reference to this job, did he give you any particular directions as to what was to be done on the job during that day?

A. He said, "Be sure and get the pipe run," and so forth

so that anybody coming in there would know and could see what had to be done to finish the job.

Q. Now, in all, how many conversations did you have with Mr. Scrivener during that day?

A. Well, one in the morning and one in the afternoon, other than talking about the job itself that was more or less everyday conversation.

[125] CROSS-EXAMINATION

[126] Q. (By Mr. Jones) What was that date that you started working for Bob Scrivener?

A. I do not remember the exact day or month. It was the first part of 1967, the first part of the year.

Q. All right. Now, isn't it true that back before March 16, 1968, there had been occasions when you didn't work a full 40- [127] hour week?

A. Yes.

Q. There had been layoffs because of lack of work or slack work?

A. Well, mostly we'd get done too late in the day to start another job.

Q. So, you might only work part of the day?

A. Well, if I got through with a certain job, say, around 2:30 or 3 o'clock, I'd go ahead and take off rather than wasting Bob's time too to get on a job and not do it.

Q. You said that Bob Scrivener talked to you out on the apartment house job?

A. Yes.

Q. Is that the same one where Mr. Moore's union put up a picket?

A. Absolutely.

Q. Was your conversation before or after the pickets started?

A. It was after the pickets started.

Q. The picketing had already started before this conversation took place?

A. Yes.

Q. And because of Mr. Moore's picket being there—they had the IBEW Local 453 on the job—it had shut down the job entirely, hand't it? All the other craftsmen walked off?

[128] A. I couldn't tell you. Part of the time that I was there, other craft workers were there.

Q. What craft was working while you were there?

A. Well, the sheet metal men.

TRIAL EXAMINER: Gentlemen, let me interject right at this point. I am not going to get into this suit under whatever you might have, under Section 301 or anything else. Let's just keep it right to the stuff that's material here.

MR. JONES: Now, Your Honor, I believe this will be material.

TRIAL EXAMINER: It might be, but I want to say that I want to be sure that it is and not just delving for information for another suit, gentlemen.

MR. JONES: I can connect it up. The only reason I have—

TRIAL EXAMINER (interrupting): I can see one point where it might be material. Go ahead.

MR. JONES: I will state that if the Board takes jurisdiction in this case, I'm certainly going to file a charge with the Board and hope they'll proceed under the picket case. I want to have that on the record that if the Board doesn't take jurisdiction here—

TRIAL EXAMINER (interrupting): Let me warn you here at this point, Mr. Jones, that there is statute of limitations and you could file, at any time, a charge. You don't just have to wait [129] to find out what the Board is going to do in this case.

MR. JONES: Without asking for an advisory opinion, can I do that without admitting jurisdiction?

TRIAL EXAMINER: You can seek an advisory opinion from the Board on that if you wish.

MR. JONES: I realize the statute of limitations part.

TRIAL EXAMINER: All right.

Q. (By Mr. Jones) How long had the picket been there on that job before Mr. Scrivener talked to you?

A. I have no idea.

Q. Well, are we talking about a matter of hours or a matter of days?

A. I would say more of a matter of weeks. The first time I was on the job, the pickets were there and that was, I guess, when the job first started.

Q. About what time and what date was that?

A. I have no idea. I have no reason to recall. It did not make an impression, the date, at this time.

Q. Let me ask you this one question to make sure if I understand. Do you know whether or not the picketing

did cause some slowdown in the work of other crafts on that job or not?

A. No, I worked very little myself with the other trades. I don't associate much with the other trades at all.

[130] Q. Now, you referred to a time when District 50 or when Mr. Smith asked you fellows in front of Bob Scrivener whether you wanted to go into a union or not. Now, let me ask you this. Did Mr. Scrivener mention District 50 by name at that time?

A. No.

Q. Did you know what union he was referring to at that time?

A. Yes.

Q. What union was he referring to?

A. He was referring to District 50.

Q. At that time, did you and all the other men indicate to Bob Scrivener that you did not want to join District 50?

A. We told Wesley Smith that we would join—let me rectify that. I believe two of the boys said that they would go along with the majority. They were all agreeable.

Q. Now, did you ever go to Mr. Scrivener after that time and tell him that you had changed your mind and decided that you didn't want to go into District 50, that you'd rather join Local 453?

A. No, sir.

Q. Now, you referred to a conversation you had with Bob Scrivener on the apartment house job on South Florence.

A. Yes.

[131] Q. That is where the picketing took place?

A. Yes.

Q. Owned by Mr. Lee Going?

A. Going? It seems like the name. I never met the man.

Q. Now, you referred to a conversation between yourself and Bob Scrivener on March 19th?

A. Yes.

Q. Who was present during that conversation?

A. Wesley Smith and Boyd.

Q. Were they present at all times?

A. During the conversation, Bob came in and looked around the apartment to see what was more or less left to be done and Wesley came in about the same time that Bob started talking, maybe a couple of seconds either way.

Q. And the picket was on the job at that time?

A. That day, I do not know.

Q. It had been earlier, at least?

A. It had been earlier, maybe the day before or the week before. That particular day, I believe it was raining and they weren't out. I am not certain of that.

Q. Did you work in there all day that day?

A. I believe so.

Q. The afternoon that I was out to your place of employment there, isn't it true that Bob Scrivener told you all—didn't he give you a reason for giving you your checks?

A. Yes, he stated that he was going through with it, that [132] he had the checks of the ones who were going through with it. Then, we got the checks.

Q. Didn't he tell you all that he wanted you to be able to better yourselves if you thought you could make more money through the union and he wanted you to have that opportunity and he didn't want you to feel like you had to keep working for him?

A. After he made the statement that Jack Moore said that he possibly would not use us, he would replace us with five good men.

Q. Yes, but didn't he also tell you that he felt you were free to work for him regardless of whether you wanted to work for the union or not?

A. That's what was in the letter. I don't remember, like you said, "To better yourselves," but he knew that we'd never get a card out of it. The minute that he signed a contract, Jack Moore would replace us with what Jack Moore stated as "with good men."

[134] Q. Regardless of what was said there at the time you received your check that evening, at least you admit that Mr. Scrivener told you to come back the next morning?

A. That's right, but he told me and Wesley and then he hollered out to Bill as Bill was getting into his truck.

Q. And there wasn't even a lapse of how much time there?

A. Oh, maybe—well, it was three or four minutes. We had to pick our tools up.

MR. WALSH: Could he get a drink of water?

THE WITNESS: I'm all right.

Q. (By Mr. Jones) Now, when Mr. Scrivener told you to come back in the morning, he didn't tell you to come back only if you decided not to go with the union, did he?

A. No, not at that time.

Q. Now, have you ever worked through the Local 453 hiring hall?

A. I have.

Q. Back before March and since then, maybe?

[135] A. Yes.

Q. Are you familiar with the rules and by-laws of Local 453?

A. Well, I've never had occasion to exercise any part of them, so actually I'm kind of lax on that.

Q. Are you familiar with the rule that requires a member of that union not to work for a non-union contractor?

MR. WALSH: I'm going to object to this question, Your Honor, for two reasons. First, it calls for a most legal conclusion of the witness and certainly it concludes facts as to whether Scrivener was a union or non-union contractor after March 18th. For those reasons, I'm going to object. I didn't get in on it in time the last time, but I'm going to object. I think it's a tricky matter.

TRIAL EXAMINER: Well, the question may go a couple of different ways. I think possibly if this is a defense for the respondent, then it should be best brought out by respondent on defense.

MR. JONES: It is merely for strengthening.

TRIAL EXAMINER: Whether this witness knows of it or not doesn't aid your defense in any way.

MR. JONES: It just seems to me like it aids it.

TRIAL EXAMINER: Please tell me why and maybe I'll understand.

MR. JONES: Well, it gives credibility to our version of [136] this

TRIAL EXAMINER: I don't see how, counsel. Whether this witness knows of the union rules or not, I don't see whether that aids you in your defense. Now, you haven't, first of all, told me whether this is in your defense.

MR. JONES: I'm sure this will come out as part of our defense as an explanation of what occurred.

TRIAL EXAMINER: If this is one of the reasons for your defense, well, whether this witness knew of the rules or not is immaterial unless at some point during that time

respondent told these employees that this was why they were being let go or discharged or something like that.

Now, there has been no testimony along that line as yet. You have offered no questions which would so indicate, so I still do not see where it is material.

MR. JONES: I think I have with one other witness with a question along that line. He admitted—

TRIAL EXAMINER (interrupting): Let me ask you, are you maintaining at this point that sometime during this conversation respondent told his employees particularly why they were being laid off?

MR. JONES: Yes.

TRIAL EXAMINER: All right. Let's get the question of whether this was what respondent told him and not what they knew.

[137] MR. FRANKCA: I just wanted the record to show that we objected to the question on the basis that it was assuming facts not in evidence. It is our position that this question is a misstatement of the rules of the union and there is no evidence here as to what the union rules were and it is objectionable for that reason.

TRIAL EXAMINER: That is why I am directing the question as to whether the respondent at this time told these employees that this was what the union rules provided and that was why they were letting them go. That question would be material and relevant to the facts if that's what the defense is.

MR. JONES: I'd rather go at it in the other order. In fact, it kind of—

TRIAL EXAMINER (interrupting): I'm not going to allow questions as to what these witnesses knew about union rules. I don't think that's relevant. What is relevant and since you are saying that this is a part of your defense is whether you told them or your client told them this.

MR. JONES: Well, I think I'll just withdraw the question. I think I've already covered it by other witnesses.

TRIAL EXAMINER: I'm sorry. I didn't hear your last statement.

MR. JONES: I've already covered it by another witness who has admitted what I was going at any way.

[138] Q. (By Mr. Jones) Now, let's see. You got the letter

marked Respondent's Exhibit No. 2 dated March 22, 1968, didn't you?

A. That looks like it (indicating).

Q. After receiving it—when did you receive that letter?

A. On Monday.

Q. Do you get mail on Saturday?

A. I do. I was informed before I got the letter that I wouldn't get it until Monday.

Q. How were you informed of that?

A. By Bob Scrivener's cousin. He came out and told me and Claude Sanders that the letter was in the mail and we should have gotten it Saturday but it didn't get mailed in time.

Q. At any rate, you went back to work the following Tuesday, is that right, the 27th of March?

A. Yes, sir.

Q. How long was it that you worked again?

A. Let's see. I went to work the—

TRIAL EXAMINER (interrupting): Excuse me. Counsel, we've got mistakes as to dates here. Monday was the 25th and Tuesday was the 26th.

Q. (By Mr. Jones) You went to work on the 26th?

[139] A. Yes.

Q. Then you worked how long?

A. Through the 18th of April.

Q. Where are you working now?

A. Well, right now I am working for Obyrne Electric.

Q. Obyrne Electric Company?

A. Yes.

Q. How long have you worked there?

A. One day.

Q. Where else have you worked since you've been laid off?

A. Since the 18th, I worked for Bob Scrivener again and got laid off again and then I worked for Mid-West Electric.

Q. Now, you were laid off after receiving this letter of March 22nd. When were you first laid off?

A. The evening of April 18th.

Q. How long were you off that time?

A. To May 4th.

Q. May 4th. Now, did you work for anyone else in between those dates?

A. Yes.

Q. Who?

A. Mid-West Electric.

Q. How many days were you without work at either place?

A. I don't recall. I think I worked about six and [140] one-half days during that period between the 18th and the 4th.

Q. At Mid-West Electric?

A. At Mid-West Electric, yes.

Q. Then you went back to work for Scrivener the 4th of May?

A. Right.

Q. You worked there how long?

A. Either—I believe it was the 10th.

Q. Then you went to work where?

A. Well, I got laid off and I went back to Mid-West.

Q. Did you miss any days working in between that?

A. Yes. I don't recall how many on that. I would have to check on that.

Q. Have you worked for Bob Scrivener again since about May 10th?

A. No, sir.

Q. And you are working at Obyrne now?

A. Obyrne—I start working Monday morning.

Q. Now, at any time since you received this letter dated March 22nd which you say you got on the 25th, has Bob Scrivener made any statement to you stating that he would take any kind of action against you for participating in union activity?

A. Not to my knowledge.

[141] Q. Or for talking to any NLRB agent?

A. The only time he mentioned that was on the morning of the 18th. He asked me if I had met with him.

Q. Did he ever say that this would be held against you in any way?

A. No.

Q. Or to anyone in your presence?

A. Not to anyone in my presence.

Q. He never asked you what the Board had asked you or anything like that?

A. No.

Q. He never asked you to tell the Board agent any particular thing, did he?

A. No.

MR. JONES: I believe that's all.

MR. WALSH: I have a few more questions.

TRIAL EXAMINER: O.K.

REDIRECT EXAMINATION

Q. (By Mr. Walsh) You testified that when you started working the second time around the early part of '67 until March 15th of '68 for Scrivener—do you remember testifying about that?

A. Yes.

Q. You said that occasionally a job would finish in the afternoon and you would go home rather than just waste time. [142] Do you recall that testimony?

A. Yes, sir.

Q. Now, when that would happen, would your practice be to return to work the next morning?

A. Yes, sir.

Q. When the picket was on the apartment job, did any of Mr. Scrivener's men refuse to work beyond the picket, to your knowledge?

A. Not to my knowledge.

Q. When you returned to work on May 4th after having been laid off on April 18th, was Mr. Hunt working for Mr. Scrivener at that time?

A. Yes, sir.

Q. Was Mr. Perryman?

A. Yes, sir.

Q. Was Mr. Statton?

A. Yes.

Q. Were they there when you left on May 10th?

A. As far as I know, yes, and one other man.

Q. Who was working then?

A. Richard—I don't know his last name—starting working on May 10th.

Q. What was his job? Do you know?

A. He was an apprentice who worked with me.

Q. He worked with you?

A. Yes, sir.

[143] MR. WALSH: That's all.

TRIAL EXAMINER: Anything further?

RECROSS-EXAMINATION

Q. (By Mr. Jones) Why was it that you didn't work on May 11th?

A. I was told that there was nothing more. I didn't have anything to do.

Q. Where were you when you were told about this?

A. In the shop.

Q. Who else was present?

A. I don't remember.

Q. Was there someone else present besides whoever told you?

A. I could not tell you who told me—who was present.

Q. Who told you?

A. Mr. Scrivener.

Q. What time of day was it?

A. It was quitting time. I believe we got off a little early that day.

Q. Isn't it a fact that you just did not come back to work on May 11th without previous notice?

A. No, that is not a fact. May 11th was on a Saturday. We never come to work on a Saturday without being told to.

Q. Well, on the following Monday, then, why did you [144] not come to work?

A. Mr. Scrivener said that we were caught up.

Q. Did he tell anyone else that besides you?

A. I do not know. I just don't recall.

* * * * *

CLAUDE SANDERS

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: Claude Sanders. I live at Route 6, Box 622, Springfield, Missouri.

[145] TRIAL EXAMINER: Mr. Sanders, you are going to have to speak up about three times as hard as you are speaking now.

THE WITNESS: O.K.

DIRECT EXAMINATION

Q. (By Mr. Walsh) Mr. Sanders, have you ever worked for Bob Scrivener?

A. Yes, sir.

Q. When did you first start working for him?

A. I believe it was in February or March. I could't be sure.

Q. Oh what year?

A. '67.

Q. And then did you work for him up until March of '68 or at least that long?

A. Yes.

Q. Mr. Sanders, were you ever present in the shop when you heard the union discussed?

A. Yes, sir.

Q. Approximately when was this?

A. It was around the middle of March. I can't remember exactly.

Q. Can you tell us what you heard at this time in this regard?

A. Well, all that was said was that Mr. Smith asked the boys if they would want to go union.

[146] Q. Did you hear Mr. Scrivener say anything at this time?

A. Well, he said something about it after Wesley Smith got through, but I don't remember exactly what he said.

Q. Did there come a time after this meeting that you had a meeting over at the union hall with Jack Moore and Ray Edwards?

A. Yes, sir.

Q. I'd like to show you General Counsel's Exhibit 3-c. Tell us what General Counsel's 3-c is, please.

A. That is an authorization for representation.

Q. For the Electric Workers?

A. Yes.

Q. Did you fill that card out and sign it?

A. Yes, I certainly did. I couldn't mistake that handwriting.

Q. Did you date it?

A. Yes.

Q. What did you do with it after you signed it and filled it out?

A. I gave it to either Jack Moore or Ray Edwards. I don't remember. They were both sitting at the table.

Q. They were both sitting at the table?

A. Yes.

MR. WALSH: I offer this in evidence.

TRIAL EXAMINER: Any objections?

[147] TRIAL EXAMINER: Received.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 3-c, was received in evidence.)

Q. (By Mr. Walsh) Now, did you go to work the day after you signed the union card?

A. Yes, sir.

Q. Did you have any discussion with Mr. Scrivener that day about the union or union cards?

A. Some.

Q. Tell us where this took place?

A. Well, it was at an apartment house on South Florence Street.

Q. Tell us what was said.

A. Well, Mr. Scrivener came on the job and he asked me where Wesley and Bud Wilson were and I said they were upstairs. At the time, I thought both of them were.

Q. You thought both of them were?

A. Yes.

Q. Keep your voice up, Mr. Sanders.

A. Well, he went upstairs and he was there for quite a while and when he came down, he came and talked to me.

Q. Were there just the two of you there?

A. Yes.

Q. What did he say to you?

A. He told me that he understood that we had signed cards up at the union hall and I said, "Yes, that's right." He said, "Well, I didn't think you boys would do me that way." He then told me what Jack Moore had said.

Q. What did he say that Jack Moore had said?

A. He said that Jack Moore had said that he was to sign a contract with the union and they wouldn't use any of the five of us.

Q. Did you make any comment? Did you respond to this in any way?

A. Yes, I did. I said if that was the way the union operated, I didn't want any part of it.

Q. Was that the extent of the conversation?

A. Yes, as far as I can recall.

Q. Mr. Sanders, did you ever give a statement to the Labor Board in this proceeding?

A. Yes.

Q. How many such statements did you give the Board?

A. Two.

Q. Do you recall the date of the first statement?

A. March the 18th, I believe—April 18th.

Q. April 18th?

A. I can't recall.

Q. All right. Now, where did you give this state- [149]
ment to the Labor Board?

A. At the union hall.

Q. Do you recall the Board agent's name?

A. Tyrus Frerking.

Q. Who else was up there? Were there any other employees up there that night?

A. Yes, sir.

Q. Who was there?

A. Oh, Bud Wilson, Wesley Smith, Bill Cockrum, Don Cockrum and myself.

Q. Did Mr. Frerking interview you all that night?

A. Yes, sir.

Q. You gave him a statement that night, is that correct?

A. Yes.

Q. Did you go to work the next day?

A. Yes.

Q. Now, when you first got to work, did you have any conversation with Mr. Scrivener?

A. Well, we were all getting ready to go to work and Mr. Scrivener—I was behind the truck and Mr. Scrivener come up there and he says, "Did the boys find out anything last night," and I said, "Not that I know of, Bob," and that was all we said.

Q. Did Mr. Scrivener say anything else at this time?

A. No.

Q. Now, did you work all day on the day after you gave [150] your statement?

A. Yes.

Q. What transpired when you came in from work that day?

A. Well, Mr. Scrivener said that he just had one house to finish up and that he would see what transpired by Monday. What came in over the weekend, in other words.

Q. I didn't hear you.

A. What came in over the weekend.

Q. What did he do then?

A. Well, he said, "If any of you boys want your checks, why, you can have them so you'll save the trip in tomorrow."

Q. Did anybody say that they wanted their checks?

A. Yes, I said that I would take mine and the rest of the boys said that they would take theirs.

Q. Who else said that they would take theirs?

A. The rest of them. I assume they did.

Q. How many got checks?

A. Five.

Q. Who were they?

A. They were Don Cockrum, Bud Wilson—four, I take it back.

Q. Now, who were they again?

A. Don Cockrum, Bud Wilson, Wesley Smith and myself.

Q. Did Mr. Scrivener have the checks in his hand?

A. No.

[151] Q. What did he do?

A. He went into the house and picked them up.

Q. How long was he in the house?

A. Oh, not very long.

Q. Could you estimate how long?

A. Oh, maybe a minute or two.

Q. Then did you leave?

A. Yes.

Q. Were you ever recalled to work?

A. No.

Q. Have you talked with Mr. Scrivener again?

A. No.

MR. WALSH: That's all, Your Honor.

CROSS-EXAMINATION

Q. (By Mr. Jones) Where are you working now?

A. Roper Electric.

Q. How old a man are you?

A. 59.

Q. You are working over there as a driver?

A. A driver and a material man.

Q. It doesn't require as much physical labor as it did when you were—

A. (Interrupting) No, it does not.

Q. How long have you been working there?

A. Oh, I don't recall.

[152] MR. FRANCKA: Mr. Examiner, just a moment. I do not see any materiality as to where this man is working or not working at this time. If there is a fact like this to become involved, of course, that would be a problem for the compliance officer. I don't want to be objecting unnecessarily, but I feel that we are spending too much time on side issues here, on matters that will never have to be determined.

TRIAL EXAMINER: I was wondering about this particular question. Where were you going with this?

MR. JONES: I want to establish that even if we offer this man employment immediately, he would not come back to work. I think we ought to establish it while we are making the record.

TRIAL EXAMINER: This is what we normally term compliance material and that comes up at a time, if there is a decision against you, then you offer it at that point. It really has no place in this hearing.

MR. JONES: It seems like it would be well to cover it now.

TRIAL EXAMINER: But that is what is normally termed as compliance matters.

MR. JONES: I would like to make an offer of proof on it if I am precluded from going into it.

MR. WALSH: I don't even think an offer of proof is [153] appropriate here. If they want to offer him a job, let them do it. It's a compliance matter.

TRIAL EXAMINER: Well, the outcome of offering the man a job can be very easily sought by offering him a job. If he takes it, he takes it.

MR. JONES: Of course, Your Honor, we are not in a position to do that. We don't have the work available.

TRIAL EXAMINER: That's a compliance matter.

MR. JONES: At this time, I would like to make an offer of proof that if this witness were allowed to answer the questions along this line, that he would testify that even if he were offered a job at the present time by the respondent, he would not take the job. He's better off where he is at his age with the type of work that he is doing, and that's the end of my offer of proof.

TRIAL EXAMINER: In the first place. I'm not sure whether you can make the offer of proof and in order to make an

offer of proof, you are suppose to know that this will be the answer. I don't know on what you will base your offer of proof since this is not your witness, that I know of, and secondly, I will reject your offer of proof.

MR. JONES: Just to make my offer right, I'll offer that if this witness were permitted—well, let me ask the question.

Q. (By Mr. Jones) Now, Mr. Sanders, isn't it true that you told Mr. Scrivener that you are better off where you are than when you were working with him and that you figured that's why he hadn't called you back?

[154] MR. FRANKA: If the Court please, I do not think this is material in any manner in this case.

TRIAL EXAMINER: It is not at this time. It is a compliance matter and I'll withhold the objection.

MR. JONES: I want to offer the proof that if the witness were allowed to answer, he would answer in the affirmative.

TRIAL EXAMINER: Your offer is rejected. Let's go on.

Q. (By Mr. Jones) Now, has Mr. Scrivener ever made any statement to you that he was going to take action against you if you participated in any union activity in any way?

A. No, sir.

Q. Has he said that he was going to take action against you for talking to a Labor Board man or anything like that?

A. No, sir.

Q. Now, have you only been laid off one time out there since March 15th?

A. Since March 15th?

Q. Yes.

A. Well, there were several short days when we got through early and came in early.

Q. Yes, and that wasn't inconsistent with the way things happened March 15th, was it?

A. Well, no. We [155] did that every once in awhile. There was a time or two when business was slack and they laid us off, some of us.

Q. At any time that Mr. Scrivener has laid you off, isn't it true that business was slack or the work was slack?

A. Well, I couldn't say as to that because we finish-up on one job and there's always something else. But then maybe—I don't know.

Q. You were laid off on April 18th. Is that the only time you were laid off?

A. Actually laid off, yes.

Q. That's what I mean. Mr. Scrivener told you at that time that he just had one house to work on and that he would have to see what came in by Monday?

A. Right.

Q. He asked you all if you wanted your checks then at that time?

A. That's correct.

Q. And you all said yes. Rather than come back the next day, you'd rather have them then?

A. Yes.

Q. You are including yourself and who else when you say "that's correct"?

A. I am including myself, Donnie Cockrum, Bud Wilson and Wesley Smith.

[156]. Q. When did you go to work where you are now?

A. I believe it was either three or four days after I was laid off.

Q. And you've worked there continuously since?

A. Yes.

[166] CHARLES DONALD COCKRUM
was called as a witness by and on behalf of General Counsel and, after first being duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated and give us your full name and address.

THE WITNESS: My name is Charles Cockrum. I live at 2136 West Chestnut.

DIRECT EXAMINATION

Q. (By Mr. Walsh) What is your full name?

A. Charles Donald Cockrum.

Q. You go by Don?

A. Right; sometimes, yes.

Q. Have you ever worked for Bob Scrivener?

A. Yes.

Q. Could you give us the approximate dates of your employment there?

A. About the middle of January, 1968.

Q. The middle of January of 1968?

A. Yes, sir.

Q. Had you worked for him prior to that time?

A. Yes, sir.

Q. For about how long?

A. Oh, several times, off and on, short times. I have quit him and I have [167] worked for him four or five times.

Q. Over a period of how long a time?

A. Approximately three years.

Q. And then you came back in January of 1968?

A. Yes, sir.

Q. Were you laid off April 18, 1968?

A. I don't know if it was the 18th or not. I was laid off around there somewhere.

Q. Did you work continuously from January until mid-April?

A. Yes, sir. I would like to rephrase that, that was March I went to work. I hadn't worked over three weeks or a month until I got laid off.

Q. Pardon me.

A. I hadn't worked for only about three weeks or a month the last time.

Q. Do you recall, did you ever go to a meeting over at the union hall?

A. Yes, sir.

Q. I will show you General Counsel's Exhibit No. 3-B, and I will ask you if you can identify that for us.

A. Yes, sir.

Q. What is that, please?

A. I don't know what it is. I signed it up at the union hall. Jack Moore explained there would probably be a hearing for an election if we [168] signed it. It didn't mean we were joining the union when we signed it, but we would probably have an election.

Q. Did you read this card first before you signed it?

A. No, sir.

Q. You didn't?

A. No, sir. I just went by what he said.

MR. WALSH: Your Honor, I have to claim surprise on this witness. He has just now testified to something directly

contrary to what is in the statement he gave the Labor Board and which I showed him last night, which he read in his car and said was correct. I am going to ask leave to lead the witness. I am claiming surprise and claiming he is a hostile witness on this basis.

TRIAL EXAMINER: What is your position, Mr. Jones?

MR. JONES: I object to that, of course.

THE WITNESS: I said it was close last night when you and Edwards was in the car. I said it was approximately close to what I had said to the man.

TRIAL EXAMINER: I will allow you to go ahead with your questioning of this witness on the basis of your claim of surprise. Go right ahead.

Q. (By Mr. Walsh) Mr. Cockrum, I will show you—

MR. JONES (interrupting): Excuse me, while you are using that may I have the other copy so I can follow along?

[169] (The documents above referred to were marked General Counsel's Exhibits Nos. 4 and 5 for identification.)

Q. (By Mr. Walsh) Mr. Cockrum, when was the first time you saw me?

A. Last night is the first time I can recall seeing you.

Q. Where are you living now?

A. 2136 West Chestnut.

Q. Is that with your in-laws?

A. Yes, sir.

Q. And you had moved, hadn't you, from the previous address?

A. Yes, sir.

Q. How long had you moved?

A. A couple three months ago.

Q. You didn't leave any forwarding address, did you, when you moved?

A. No, sir.

Q. Our office had to send stuff to you at your brother's isn't that right?

A. No, it come to my address and my brother brought it to me the other day and had me open it. I didn't know what was in it. It was addressed to me, though, but it hadn't been opened when I received it.

Q. Ray Edwards and I came by your house last night, didn't we?

MR. JONES: I am asking if I can have a standing objection on the grounds it is leading. It is an attempt to [170] impeach his own witness, cross-examination of his own witness.

TRIAL EXAMINER: Counsel has claimed surprise and I have said he could proceed.

Q. (By Mr. Walsh) Ray Edwards and I came and we went out in the car didn't we?

A. Yes, sir.

Q. I will show you General Counsel's Exhibit No. 4 and General Counsel's Exhibit No. 5, and I will ask you if you have ever seen those before and if you can identify those for us.

A. Yes, I seen these last night.

Q. Pardon me.

A. Yes.

Q. I gave you both of these last night and asked you to read them?

A. You gave me a typed copy.

Q. Didn't I give you the handwritten ones and told you to read them?

A. Yes, but you took them.

Q. I took them back and told you to keep the typed ones so as to refresh your recollection, isn't that correct?

A. Yes.

Q. Isn't it a fact that we sat in the car and you read both of these statements?

A. Yes, sir.

[171] Q. Did I ask you if those were correct?

A. You said were these close to what you gave and I said they were.

Q. I said are those close to what you gave?

A. Yes.

Q. Did I tell you that today I would put you on the witness stand and ask you questions based on these statements?

A. You said I would be on the witness stand.

Q. I gave you a subpoena, didn't I?

A. Yes.

Q. And you read these and what did you tell me?

A. I said yes, they are close.

Q. Now, I want you to direct your attention to General Counsel's Exhibit No. 4, and I want you to read the paragraph beginning, "On March 18th". It is the second paragraph. Read that to us, please.

A. "On March 18th, 1968, I signed a union authorization card for the I.B.E.W. Both Ray Edwards and Jack Moore told the five employees present that by signing the card and authorizing the union to represent us."

Q. You just testified that you didn't read this card and you didn't know what it was, but Jack Moore told you that card was only to get an election, is that correct?

A. That is the understanding I had at the time I signed the card, yes, sir.

[172] Q. And you call what you just read out of this statement close to that?

A. I don't know what authorizing a union to represent me means. I don't know anything about the union.

Q. What is your correct testimony, what you told in the statement—

MR. JONES (interrupting): Your Honor, I would like to ask some voir dire questions about the statement, if he is going to go into all this.

MR. WALSH: I will offer the statements in evidence, Your Honor.

MR. JONES: I want voir dire first.

MR. WALSH: I want to offer General Counsel's Exhibit Nos 4 and 5.

TRIAL EXAMINER: I don't think General Counsel's Exhibit No. 4 has been sufficiently identified, because he just saw them last night according to his testimony.

Q. (By Mr. Walsh) Tell us what General Counsel's Exhibit No. 4 is, Mr. Cockrum.

A. Exhibit 4—

MR. JONES (interrupting): I object to the form of the question.

TRIAL EXAMINER: The question—Can you tell us what that is?

THE WITNESS: Is that (indicating) Exhibit 4?

[173] Q. (By Mr. Walsh) I would just like for you to tell us what that document is.

A. This is a statement I gave to, I don't know what his name was, a union official, I imagine.

Q. Do you mean a Labor Board official?

A. Yes. I can't recall his name.

Q. Was it Ty Frerking?

A. I believe it was.

Q. Didn't you give him this statement the night before you got laid off on April 18th?

A. Yes, sir, I believe it was.

Q. When you gave this statement didn't you swear it was true and correct to the best of your knowledge and belief?

A. Yes, I skimmed over it and signed it.

Q. You didn't read this too closely?

A. No.

Q. But you signed it?

A. Yes.

Q. And you swore it was true and correct to the best of your knowledge and belief?

A. Yes, sir.

MR. WALSH: I offer General Counsel's Exhibit No. 4 into evidence as a prior inconsistent statement.

MR. JONES: I would ask for some voir dire. On the document marked General Counsel's Exhibit No. 4, [174] is that a three-page document?

THE WITNESS: Four-page.

MR. JONES: Is that document in your handwriting or somebody else's?

THE WITNESS: Someone else's.

MR. JONES: Whose handwriting is it in?

THE WITNESS: The fellow.

MR. WALSH: Ty Frerking?

THE WITNESS: Frerking.

MR. JONES: The terminology in here, is the the words you used or the words he used?

THE WITNESS: No, sir, he reworded it in the statement. I noticed in there one place that said Bob had two apartment houses in the process of being done, and I told him he had one apartment and a duplex and he put two apartment houses.

MR. JONES: I notice on the front here April 17th you wrote out or he wrote out for you and had you signed, "Please supply the undersigned a copy of the statement

supplied the N.L.R.B. on this date: Don Cockrum". Did they ever supply you with a copy of this statement you could keep?

THE WITNESS: No, sir. I asked for a copy and they never did send me a copy of the statement. Just last night this (indicating) fellow gave me two typed copies of the statements.

MR. JONES: Last night when you were talking with Mr. Walsh were you and Mr. Walsh alone or was someone else there?

[175] THE WITNESS: Ray Edwards was there and myself.

MR. JONES: Have you had an opportunity to fully read this statement today?

THE WITNESS: Last night I read the typed copy.

MR. JONES: Can you tell the Trial Examiner whether or not this is a truthful and accurate version of what you told Mr. Frerking.

THE WITNESS: Most of it. Like I said, some of it—it is pretty close.

MR. JONES: The part about signing the authorization card?

THE WITNESS: The understanding I had in signing the card was that I didn't quite understand it in the first place. I understood there would probably be an election but it wouldn't be known how I voted.

MR. JONES: I am going to object to the introduction of this statement on the grounds this portion of the statement which General Counsel is seeking to use is not properly identified as being accurate, and, of course, the other portions are not relevant to this point.

TRIAL EXAMINER: May I see it, please. Let me ask you a few questions, Mr. Cockrum. This statement is on three pages, is that correct?

THE WITNESS: I guess so.

TRIAL EXAMINER: If you have any doubt look at it.

[176] THE WITNESS: I will say it is.

TRIAL EXAMINER: You were present when this statement was written out?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: In whose writing is it?

THE WITNESS: He wrote it out.

TRIAL EXAMINER: You read it after that?

THE WITNESS: I just glanced over it and signed it. I was trusting the union at that time.

TRIAL EXAMINER: What did the investigator say, did he say anything to you at that time?

THE WITNESS: Did he say anything to me?

TRIAL EXAMINER: Did he say anything to you about reading it?

THE WITNESS: He handed it to me and told me to look it over and sign it.

TRIAL EXAMINER: Did he ask you to sign each page?

THE WITNESS: I don't believe he did. He had me initial one place on there, something he made a mistake or something.

TRIAL EXAMINER: I see some initials on the first page, are those your initials?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: I see on the second page two sets of initials, "D.C.", where things are stricken out, are those your initials?

[177] THE WITNESS: Yes, yes; he showed me those and I put my initials there.

TRIAL EXAMINER: On the third page it says, "So subscribed and sworn to before me this 19th day of April, 1968, at Springfield, Missouri." Did he have you formally stand up and swear to it?

THE WITNESS: He wrote that out after I had already made the statement and had it signed.

TRIAL EXAMINER: My question to you is did you swear to this statement.

THE WITNESS: No, sir, I just signed what he's got there.

TRIAL EXAMINER: Did he administer an oath to you as I just stated here?

THE WITNESS: I don't remember whether he did or not. I don't believe he did.

TRIAL EXAMINER: Did you see this after you signed it, "Subscribed and sworn to before me"?

THE WITNESS: Yes, sir, I saw that.

TRIAL EXAMINER: Did you have any objections to where it said "Sworn to" if he didn't swear you?

THE WITNESS: No, sir. No, sir, I read that, I know he wrote that out, and I signed it, but I mean, orally I don't believe he did.

TRIAL EXAMINER: Are you telling me that where this says sworn to he didn't do it and you had no objection to it?

[178] **THE WITNESS:** Well, it was on paper where I was sworn to and my signature verifying.

TRIAL EXAMINER: Are you telling me, then, that this you swore to as the truth?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Then, Mr. Cockrum—

THE WITNESS (interrupting): Like I said, that is not word for word the statement I give him.

TRIAL EXAMINER: But this is word for word what you swore to, isn't it?

THE WITNESS: I guess so.

TRIAL EXAMINER: I'll take it.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 4, was received in evidence.)

Q. (By Mr. Walsh) What did you say, Mr. Frerking wrote down two houses or something?

A. No, two apartment houses and a duplex. Read this, it was in the copy you give me last night.

TRIAL EXAMINER: Just for the record, so it is not confused, General Counsel's Exhibit No. 5 has now been handed to the witness.

Q. (By Mr. Walsh) Will you identify that for us, please, Mr. Cockrum?

MR. JONES: I might ask, Your Honor, I object to that statement on the grounds that it was not only improper impeach- [179] ment on one point, but the other parts were irrelevant.

TRIAL EXAMINER: I am not going to take the statement piecemeal. The statement, in the whole, is sworn to. It is in for whatever purpose, for impeachment or whatever.

MR. JONES: For evidence of what it said in the statement?

TRIAL EXAMINER: This was presented as a prior inconsistent statement, that is what it was offered for.

MR. JONES: But you are not accepting it for the truth of the other things that are in it?

MR. WALSH: We are going to give him a chance to go through that.

MR. JONES: I just wanted to be sure I understood.

Q. (By Mr. Walsh) Can you identify that, Mr. Cockrum?

A. Yes.

Q. What is that?

A. It is a statement I give to the union.

Q. You mean the Labor Board man?

A. Yes.

Q. Who signed that aside from yourself? Mr. Tyrus Frerking?

A. Tyrus Frerking, yes.

Q. He is the same guy, the field examiner, isn't that what it says?

A. Yes.

Q. He is the same one who you gave the first one to, isn't he?

A. Yes.

[180] Q. And would your testimony be the same about the circumstances under which—

TRIAL EXAMINER (interrupting): I don't like to interrupt, but would you rephrase your question.

Q. (By Mr. Walsh) Would you read the statement.

A. All right.

Q. Did you read the statement before you signed it.

A. I read most of it.

Q. There is a scratch-out here on the first page.

A. Yes, sir, he showed me that and I initialed it.

Q. You initialed that?

A. Yes.

Q. And there is a scratch-out on the second page, isn't there, or something? I think it is added there in parenthesis. Do you see your initials there?

A. I don't remember what I initialed it for.

Q. And you signed this, is that correct?

A. Yes, sir.

Q. Mr. Cockrum, the day after you signed your union card did you go to work that day for Mr. Scrivener?

A. Yes, sir.

Q. The 19th of March?

A. Yes, sir.

Q. I want to ask you a question, I want to backtrack a

[181] little. How long had you been working for Mr. Scrivener before the date that you signed your authorization card?

- A. About three weeks to a month.
- Q. Did you work regularly?
- A. I think I was off a few days.
- Q. How many?
- A. I don't recall how many.
- Q. You went to work the next day, is that right?
- A. Yes, sir.
- Q. On that day did you ride from work on the job site back to the office with Mr. Scrivener?
- A. Yes, sir.
- Q. Was anybody else in the car?
- A. No, sir.
- Q. Tell us what was said in that trip about the union.
- A. I don't know if there was anything said about the union. He said he might have to lay some guys off.
- Q. Tell us what was said.
- A. He said he might have to lay some of the guys off. He said if they would have come and talked to him about it that he might have considered, but they went up there and signed up without talking to him.
- Q. Did he ask you if you had signed up?
- A. No. I guess he knewed Jack Moore made a statement that Bob was in doubt about the majority of men signing, so he showed him [182] the cards. I imagine he seen my name on the card.
- Q. It didn't come out in the conversation, though, is that correct?
- A. No.
- Q. Did he say anything about your brother?
- A. Yes. He said he would probably let him go.
- Q. Did he say he would have to let him go for sure?
- A. Something like that, I don't recall for sure.
- Q. Didn't he say, "You boys have gotten me in a hell of a mess."?
- A. He said a mess.
- Q. Didn't he also say that he would really be in a mess if he earned a little more money?
- A. I don't recall him saying that.
- Q. You don't recall that?
- A. No, sir.
- Q. I would like for you to look at General Counsel's Exhibit No. 4 in evidence and see if that refreshes your

recollection a little bit more. Is that what Mr. Scrivener said?

MR. JONES: Again, I object.

A. I don't remember anything in the statement like that at all.

Q. (By Mr. Walsh) Do you recall anything being said about James Mitchell Electric?

A. He said James Mitchell [183] was working across the street from where we were working that day, and he said James told him if we came out there looking for a job that he was going to offer us \$1.25 an hour, like it's got in the statement.

Q. I am not sure I understood you. Did you say Mitchell had told Scrivener this or Scrivener told Mitchell this.

A. He said Mitchell had told him that.

Q. I want to direct your attention to the sentence in your statement beginning with "He" (indicating).

A. I didn't make that statement. He reworded this. I made the statement he had talked with Mitchell and Mitchell had told him he was going to offer us \$1.25 an hour.

Q. Mr. Frerking reversed it?

A. Yes, sir.

Q. In other words, this is your testimony, that he also called James Mitchell Electric and told him if any of Scrivener's employees called for a job Mitchell was to pay a \$1.25 per hour, even if he could use them, that that is not the way you told it to Mr. Frerking?

A. No, sir.

Q. Didn't you initial a change right in the middle of that sentence?

A. He just showed me, like I told you a minute ago, he just showed me where he scratched out and I initialed it for him.

TRIAL EXAMINER: This, I think, is rather serious, Mr.

[184] Witness. I want you to realize it, because what you are, in effect, saying is that a federal official of the National Labor Relations Board has deliberately distorted testimony.

THE WITNESS: I didn't say deliberately.

TRIAL EXAMINER: Wait a minute, understand me. What you were saying is that he reversed it, that he has deliberately distorted testimony you were giving.

THE WITNESS: I didn't say that. I said he could have misunderstood me because I said Mitchell had told Bob, I did not say Bob had told Mitchell.

TRIAL EXAMINER: I still say that what you were saying here and implying is that an official of the Board has deliberately distorted testimony by saying that it has been reversed. This is a statement that you read over, that you initialed, and that you swore to.

THE WITNESS: Yes, sir.

TRIAL EXAMINER: How can you swear to a statement where there is such a complete distortion.

THE WITNESS: I told you I didn't read it over or I would not have signed it. I should have. It will have to go like it is now, I realize that, but Bob told me that night that Mitchell told him that if any of us went out there for a job he was going to offer us a \$1.25 an hour. That is what Bob said on the way out.

Q. (By Mr. Walsh) Let's go on to the next sentence, [185] Mr. Cockrum, and let me ask you if this is true. "He said he had called some other contractors and they wouldn't be needing any help. He said the employees had now made their bed and now they could sleep in it." Did Mr. Scrivener tell you that?

A. Yes, sir.

Q. You were laid off and given a check on the day after you gave Mr. Frerking the first statement, isn't that correct?

MR. JONES: Your Honor, I just want to make it clear that I have a standing objection to all of these leading questions.

MR. WALSH: Yes, sir.

TRIAL EXAMINER: I have said that you have.

MR. JONES: I don't know how long it is going to persist.

A. No, sir. I was only laid off once during this period of time.

Q. (By Mr. Walsh) That was the second statement, wasn't it? Here is General Counsel's Exhibit No. 5, which is not in evidence yet. That is the second statement? Look at the date at the end of that.

A. 1st of May.

Q. Does that refresh your recollection as to when you gave him this statement?

A. Yes.

Q. In other words, he filled it out there when you gave him the statement, didn't he?

A. What is the date on the other one?

[186] Q. Let me give that to you. Look at this statement and see if that refreshes your recollection with respect to when you gave him that statement.

A. Yes, this is the first statement. It was after I gave him the second statement I was laid off.

Q. You weren't laid off on April 18th with the other three people?

A. Yes, I was laid off when "Bud" and Claude and me, I don't know what date it was, but we was all laid off together.

Q. Wasn't it the day after you all went down to the union hall? You went down to the union hall and talked with Mr. Frerking?

A. Yes, sir, the night before.

Q. You had been there the night before?

A. Yes, sir.

Q. Isn't it a fact you have worked for Mr. Scrivener on and off for about four years, three or four?

A. Three or four, off and on, yes.

Q. During that period of time had you ever been laid off for lack of work?

A. No. I didn't work for him steady for four years, just off and on, a short time.

Q. But during the period you worked for him were you ever laid off for lack of work?

A. No, sir.

[187] Q. That is true even in the wintertime, isn't it?

A. I work in the wintertime, yes.

Q. That certainly applies to the wintertime when you were working?

A. Yes.

Q. What work was going on during that time, April 18th, by the Scrivener Company?

A. I think I worked on the duplex on April 18th.

Q. Let me hand you your statement, General Counsel's No. 5, and direct your attention to the paragraph beginning "AS of April 18th—", and let me see if that refreshes your recollection.

A. Yes.

Q. Tell us what job you were on then.

A. I don't know where they was at, but there was some houses being roughed in.

Q. There were three of them, weren't there?

A. There may have been more than that and there may have been less, I told him approximately.

Q. You said at least three houses?

A. Yes.

Q. Is that correct?

TRIAL EXAMINER: Let's find out. Did you tell him "Approximately" or "at least"?

THE WITNESS: I don't know. I imagine there was three houses anyway. I probably said approximately three.

[188] TRIAL EXAMINER: Did you tell him "approximately" or "at least"?

THE WITNESS: Let me look and see. It was at least three.

TRIAL EXAMINER: All right.

Q. (By Mr. Walsh). What has been the practice in the past summers with respect to air conditioning?

A. Which summer is that?

Q. It says here that in the past summers you did all the wiring for air conditioning for Tom Powell & Son.

A. We did some of that work.

Q. Who is Tom Powell & Son?

A. He runs an air conditioning thing.

Q. April is a pretty busy season for electrical contractors, isn't it?

A. I don't know that it is any busier than any other.

Q. After you were laid off on April 18th, did you work for Mr. Scrivener? Are you working for Mr. Scrivener now?

A. Yes, sir.

Q. Let's go back. From April 18th, how long was it before you worked again? Do you recall?

A. No. I would say a couple three weeks.

Q. Was it on April 30th that he called you and asked you to come over and help him on a house?

A. He didn't call, he come [189] by the house.

Q. Look at the third paragraph of that statement, that might help you a little.

MR. JONES: I object to this procedure. If he is trying

to refresh he is—I object to this procedure. It is making a mockery out of the hearing.

TRIAL EXAMINER: Just a minute, counsel. I won't accept that term under any condition. I think that is a rather gross statement of yours.

MR. JONES: I didn't mean to reflect against the Trial Examiner.

TRIAL EXAMINER: Well, you did.

MR. JONES: I object to the procedure that is being followed.

TRIAL EXAMINER: There is quite a bit of difference in your statement. Counsel has claimed surprise as to what this witness has said. I have allowed him to proceed. What are you specifically objecting to?

MR. JONES: I am objecting to every question he goes after, when the witness gives an answer he hands him the statement and tries to get him to change his answer.

TRIAL EXAMINER: If there are inconsistencies in the statement I will allow him to do that. I am trying to find out, also.

[190] MR. WALSH: Yes, sir, and I am trying to find out what his best recollection is.

MR. JONES: Then get his best recollection at this time without using the statement and coaching him along with each question by putting the statement in front of him and trying to get him to state that before he says his recollection is exhausted. That is the point. I may not be phrasing it properly, but I think he should be permitted to exhaust his present recollection and tell us.

TRIAL EXAMINER: I have heard the witness make statements and counsel has pointed him to places in an affidavit and he has changed his statement. I am not going to have counsel ask him if his recollection is completely exhausted and then do that, I think that would be a gross waste of time. If that is your objection, I will overrule it.

MR. JONES: What I am trying to say, and I may not be stating it very artfully, but the statement is being used to lead the witness on points that have not been actually covered to see whether the witness actually remembers it now or not.

TRIAL EXAMINER: I disagree with you, counsel. I will allow him to continue.

Q. (By Mr. Walsh) I just have a few more questions.

A. Yes, sir, I went back to work for Bob.

Q. You went back to work on April 30th?

A. Yes:

[191] Q. In the afternoon?

A. Yes.

Q. And when did you return to him again?

A. Just two or three weeks ago.

Q. You have been working for him ever since?

A. I am in my third week, I believe, yes.

MR. WALSH: I offer General Counsel's Exhibit No. 5 in evidence, Your Honor, as having clarified several instances in the witness's testimony, since the witness has adopted this as his testimony.

TRIAL EXAMINER: Objection.

MR. JONES: I object. The statement is not relevant, it is immaterial. It is not properly authenticated or identified by the witness.

TRIAL EXAMINER: As to that, let's have some further identification for this statement. My recollection right now is foggy. I am not sure whether the witness has identified that he swore to this statement or not.

MR. WALSH: Yes, sir. I took him through that afterward.

TRIAL EXAMINER: But I don't recall whether the witness was asked. I recall the witness saying he skimmed through it.

Q. (By Mr. Walsh) You skimmed through this one, too, Mr. Cockrum?

A. Yes, sir.

[192] Q. Did you swear to it, that it was true and correct to the best of your knowledge and belief?

A. Right here (indicating). It says, "Subscribed and sworn to".

Q. Did you swear to that?

A. Yes, sir, I did.

MR. WALSH: I will offer it in evidence.

TRIAL EXAMINER: Objection.

MR. JONES: It is irrelevant and immaterial and improperly identified. Also, I had a standing objection in that I don't think it is properly identified, it was identified by leading questions in an attempt to impeach his own witness.

TRIAL EXAMINER: There is no question about this, but I see there are statements in here that apparently were not

made in the other affidavit, and the testimony has been somewhat jumbled, having one affidavit in I think it might clarify matters if we had both of them in. I will accept it.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 5 was received in evidence.)

Q. (By Mr. Walsh) Have you talked to anybody about your testimony today, besides myself?

A. About my testimony?

Q. Yes.

A. No, sir.

Q. Didn't you get into a little trouble with the police about [193] two weeks ago?

MR. JONES: I object to that.

A. I don't think that is any concern of yours.

MR. JONES: I object to any question of that type as improper. If he wants to ask him about a convicted felony or misdemeanor, that is one thing.

MR. WALSH: I am leading up to something, Your Honor, and I think it is proper to show why.

TRIAL EXAMINER: Do you want to excuse the witness? Step out in the hall, please.

Off the record. (Discussion off the record.)

TRIAL EXAMINER: On the record.

The witness is still out in the hall. My question is, do you want this on the record or off the record?

MR. WALSH: It makes no difference to me, whatever your preference is. I will tell you what I want.

TRIAL EXAMINER: All right. I think possibly if there is an objection it is best if we have it off the record.

MR. WALSH: I intend to show, Your Honor, by this witness that first of all it is obvious this witness has been very hostile and uncooperative with General Counsel. He was very cooperative, I think it is shown in the statements, with the Board until a short time ago. It came to my attention during the pretrial investigation that this man was charged with, I believe, tampering [194] with cars two or three weeks ago, and about a week ago, I can't give you the exact date, I'd have to check it, he was at a preliminary hearing in a criminal matter. He was represented by Mr. Jones, this lawyer. I think this is certainly relevant to show this witness's hostility. I am not sure whether or not it is a conflict of interest. In other words, I think this witness

has bolted on me because of these events which have taken place.

MR. JONES: Your Honor, I will state that I am defending Donald Cockrum on a charge in Magistrate Court, Greene County at this time. He came to me and requested me to do so, and I am doing so. I very carefully have explained—I don't think I ought to go into that, though. I don't think I ought to go into what I have cautioned him unless you want me to. But this would have nothing to do with this case, and he understands that.

TRIAL EXAMINER: Go ahead.

MR. JONES: I don't think it is proper to bring in an accusation of criminal guilt because it is very clearly the law in this state and elsewhere that a charge of a criminal violation is not usable for impeachment purposes in this state at the time, and neither is a felony or a misdemeanor. And the charge of a felony or misdemeanor is not admissible to impeach evidence of the witness, and that should not be gotten in, a conviction.

[195] MR. WALSH: That is not the purpose of the question.

TRIAL EXAMINER: That is what I presumed, that it was not, and I think that under the circumstances I will allow counsel to go into it. The question here is not impeachment on the basis of the charge, the question here is the question of surprise plus possible impeachment, and it seems to me almost possible perjury at this point, and the nature of the relationship between this witness for General Counsel and Respondent's counsel. I think under these circumstances I will let him go into it.

MR. JONES: I frankly did not know he had ever given a statement. I did not ask him, I stayed away from that entirely. I did not know he had given a statement.

TRIAL EXAMINER: That may be as it may, but I think under what has happened here, I think I will want counsel to go into this. Mr. Cockrum, you may come back.

Mr. Walsh.

Q. (By Mr. Walsh) Mr. Jones is representing you now in a criminal proceeding, isn't he?

A. Yes, sir.

Q. He represented you at your preliminary hearing about a week ago?

A. Yes, sir.

[196] Q. How did you happen to go to Mr. Jones?

A. What do you mean, how did I happen to go to him?

MR. JONES: I object to that. That is violating attorney confidence and privilege. It is getting far afield.

TRIAL EXAMINER: I don't understand how he happened to pick you as an attorney violates the attorney-client privilege.

MR. JONES: I object. I think it is improper.

TRIAL EXAMINER: Can you tell me how it would invade that privilege? As I understand the attorney-client privilege, it is only communications between attorney and client, not preliminary questions such as this. This seems to me to be before the relationship began.

MR. JONES: I think it would be privileged on how a man would select his attorney.

TRIAL EXAMINER: Tell me how, that is what I am asking.

MR. JONES: I haven't reached it, frankly.

TRIAL EXAMINER: At this point we will hold that it isn't.

Q. (By Mr. Walsh) Did Mr. Scrivener put your in touch with Mr. Jones?

A. No, not exactly. In a way. I didn't know any attorneys, and I asked him Don's name. I had seen him out at the shop.

Q. You asked Scrivener how to get in touch with him, didn't [197] you?

A. Yes, sir, if it is any of your business, and I don't see why my case has any concern on this whatsoever.

Q. We are not going to get into your case, and I am not concerned.

A. You are——

TRIAL EXAMINER (interrupting): Just a minute. I have ruled certain questions can be allowed. Stay within those bounds.

Q. (By Mr. Walsh) Mr. Scrivener put you in touch with Mr. Jones, didn't he?

A. I asked him to, yes.

Q. Is Mr. Scrivener paying Mr. Jones's fee to represent you in this?

A. No, sir.

Q. Who is paying the fee?

A. I am.

Q. Is Mr. Scrivener helping you with the payments?

A. No, sir,

MR. WALSH: That is all I have.

TRIAL EXAMINER: I would like one further question in regard to this. Can you give me a date as to when you employed Mr. Jones as your counsel?

THE WITNESS: The date?

TRIAL EXAMINER: Yes.

THE WITNESS: Wasn't it about the 13th or 14th?

[198] **TRIAL EXAMINER:** Of what?

THE WITNESS: Of this month.

TRIAL EXAMINER: Of June?

THE WITNESS: Yes.

TRIAL EXAMINER: All right.

MR. WALSH: That is all I have, Your Honor.

MR. FRANCKA: I have a few questions, Your Honor.

TRIAL EXAMINER: All right.

DIRECT EXAMINATION

Q. (By Mr. Francka) Directing your attention to the employment of Mr. Jones by you as your attorney in this criminal action, you say you talked to Mr. Scrivener about it?

A. Yes, I asked him.

Q. Where were you at the time this conversation took place?

A. I was on the phone; I believe I was at the shop.

Q. You were already out on bond then, is that right?

A. Yes sir.

Q. And were you working for Mr. Scrivener at that time?

A. I was coming to work for him.

Q. Had you made arrangements to go to work for Mr. Scrivener when you were making bond?

A. Did I make arrangements, no, sir.

Q. How were the arrangements made? Who made them?

A. My father and step-mother.

Q. And at the time you went to work for Mr. Scrivener what was the conversation you and he had concerning the employ- [199] ment of Mr. Jones?

A. I didn't even talk to him about an attorney until I called him. I told him I had to take off the next day to go see an attorney that the man had recommended for me, and I went on to work. I asked him what Don's name was because I didn't know this other attorney either. He told me, he said that if I would like to talk to him, and I did, and I hired him as my attorney.

Q. Did he in any way guarantee Mr. Jones's fees for representing you?

A. What do you mean?

Q. Mr. Scrivener.

A. No. Mr. Jones asked me and he told me how much it would be and we agreed on it, and I am going to pay him.

Q. Mr. Cockrum, in addition to the Board attorney, investigator, and Mr. Walsh, you also talked to me about this case one time, didn't you?

A. I don't recall. I remember your face, I may have.

Q. Weren't you in a group of people at the electricians' hall right after your discharge?

A. Yes, sir.

Q. This was just a matter of a day or two?

A. Yes.

TRIAL EXAMINER: Speak up.

[200] Q. (By Mr. Francka) And you were present with your brother, Bill Cockrum and Wesley Smith?

A. Yes, sir.

Q. And at that time I interviewed the group concerning what had taken place?

A. Yes.

Q. And this was preliminary to our filing a charge with the Board, was it not?

A. Yes, sir.

Q. And didn't I indicate to you at that time that we would be filing some charges?

A. I think so.

Q. By the union on your behalf?

A. I think so.

Q. And at that time we reviewed the details of what took place in the various conversations we have covered here today?

A. Yes, sir, we all went over them.

Q. And you have been in the courtroom during the entire hearing, haven't you?

A. Yes, sir.

Q. Except for the few minutes you were excused?

A. Yes, sir.

Q. And during that interview we covered each of the events that had occurred up to that time, isn't that right? And my recollection is that during that interview you described Mr. Scrivener's [201] statements concerning your

brother Bill and Mr. Wilson on the day to the shop on the evening of the 15th as being the ring leader, and as a result he was going to fire them, isn't that right?

A. I don't recall saying ring leaders, but—

Q. (interrupting) But he did indicate he was going to fire them because he thought they were the promoters?

A. He didn't say fire, he said he would probably have to let them go.

Q. Because of the fact he thought they were responsible for bringing in the I.B.E.W., isn't that right?

A. That's right.

MR. JONES: Is it understood as to my standing objection on leading questions? It is to apply to Mr. Francka's questions.

TRIAL EXAMINER: I will take your objection on that basis, but I will overrule it. Go ahead.

Q. (By Mr. Francka) Your last answer was yes?

A. Yes.

Q. In reference to a conversation had that evening between Mr. Jones and Mr. Scrivener and the employees, you were present that evening, too, is that right?

A. Yes, I was.

Q. And during the interview you indicated an agreement with the other statements that had been made concerning what [202] took place that evening, isn't that right?

A. I didn't understand your question.

Q. Didn't you indicate an agreement that Mr. Scrivener had indicated Mr. Jones was going to be there that evening?

A. Yes.

Q. All right.

A. We waited that evening.

Q. Prior to this time had Mr. Scrivener ever discussed with you personally District 50?

A. Oh, about three years ago he said something about it, but we just let it go.

Q. What did he say about it at that time?

MR. JONES: Objection. It is beyond the statute of limitations.

TRIAL EXAMINER: That is very distant, isn't it?

MR. FRANCKA: All right.

Q. (By Mr. Francka) Let's move up closer, then. What was the next time previous to this?

A. He never did say anything to me about District 50 after that.

Q. Was District 50 ever mentioned during the evening of March 15th?

A. When Jones was there?

Q. Yes.

TRIAL EXAMINER: Let's be sure. On March 15th Mr. Jones was not there.

[203] MR. FRANCKA: Excuse me, that's right.

Q. (By Mr. Francka) This is the Friday before Mr. Jones was there?

A. The Friday before Mr. Jones was there, is that when Wesley asked us about it?

Q. I think so.

A. Well, I don't know each date. I thought I heard something about District 50, but I am so mixed up now I don't know whether I did or not. I thought Wesley asked us if we would like to join the union, District 50.

Q. Did Mr. Scrivener ever mention District 50 in that conversation?

A. I don't recall him saying anything about District 50.

Q. Did you go to the electricians' hall and sign your card? I believe that was your testimony. Is that correct?

A. Yes, I did.

Q. The next time, when was the next time you discussed District 50 with Mr. Scrivener or in Mr. Scrivener's presence after you signed this card?

A. I don't believe I did.

Q. Was discussion had about District 50 by Mr. Scrivener or Mr. Jones on the evening of March 18th?

A. Is that when Mr. Jones was out there?

Q. Yes.

A. I'd say no. That was after we signed the [204] cards?

Q. Yes.

A. He just said that Bob didn't come under the jurisdiction of union.

Q. Did he discuss District 50 at all during that evening?

A. I don't recall him doing that.

Q. Did he discuss Local 453?

A. He was talking about NECA or something and 453, and he was talking about the initiation fee that they was talking about awhile ago, and Mr. Jones was talking about the sheet metal union when he quoted the initiation fee. He

said he presumed that would be close to what the electrical workers would charge, but he didn't know.

Q. Did you tell me that that particular evening he was talking about the sheet metal workers when he mentioned the \$300 fee?

A. That was, well, the evening, I don't know the date, no. I haven't kept up with any of the dates.

Q. In reference to Mr. Jones's statement about \$300 and the sheet metal workers, did you tell me on the evening I was interviewing you that it was the sheet metal workers he was talking about?

A. Yes, sir, I believe I did. He said he figured the union dues, initiation fee, would be approximately around the same as the sheet metal workers.

[205] Q. After the 19th when was the next time you discussed anything about unions or no unions with Mr. Scrivener?

A. After the 19th, that was after you were out there, right?

MR. JONES: I believe the record shows I was there the 19th.

TRIAL EXAMINER: It does.

A. After the 19th, I don't believe I talked to him after the 19th.

Q. (By Mr. Francka) Was there anything discussed at this meeting about the Board having jurisdiction or not having jurisdiction?

A. At the union meeting?

Q. No, at the meeting of the 19th.

A. Yes. Mr. Jones said they didn't have, he didn't come under, whatever it is, you know.

Q. Do you recall that during this interview that I had a tape recorder going and we discussed this, that I was going to record it and have it transcribed later?

A. Yes.

Q. As a matter of fact we stopped a couple of times to listen to be sure it was recording?

A. Yes.

Q. All right.

A. And it was.

MR. FRANCKA: Those are all the questions I have.

Mr. Walsh: I am sorry, I want to offer General Counsel's Exhibit No. 3-B into evidence, the card by Don Cockrum.

TRIAL EXAMINER: Any objections?

MR. FRANCKA: I have no objections. However, I just found it here (indicating). I have one more question.

TRIAL EXAMINER: Let me take care of this first. Any objection to this?

MR. JONES: No objections.

TRIAL EXAMINER: Received.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 3-B, was received in evidence.)

Q. (By Mr. Francka) I am not sure the record is quite clear as to when the statement was made that you testified to. You said Jack Moore made a statement about showing the cards to Scrivener.

A. Yes, sir.

Q. When did he make that statement?

A. He made that statement right in this chair this morning.

Q. Did he make it previously?

A. He said Bob and him, and I believe Ray, was having a meeting in the office.

Q. I am not asking what he said this morning.

A. That is what I was referring to, this morning.

Q. Didn't he tell you there at the time he met with you in [207] his office?

A. That he would show the cards?

Q. Yes, that he would show Scrivener the cards or had shown him the cards?

A. Yes.

Q. And this was at the meeting on the 18th?

A. Yes.

MR. FRANCKA: That is all I have.

TRIAL EXAMINER: Mr. Jones.

CROSS-EXAMINATION

Q. (By Mr. Jones) They have brought up the fact of the case in which I am representing you, and I think you have testified you sought me out to represent you on that.

A. Yes, sir.

Q. Isn't it true that I told you that in order to take that case it would have nothing to do with this proceeding here?

A. Yes, you did.

Q. If you wanted me to represent you I would?

A. Yes.

Q. When did you start going to work for Bob Scrivener this last time? I believe you said in your statement here that is in evidence that you worked for him on and off for four years, but I mean this last long span of time, when did you go back to work for him?

A. About three weeks ago.

[208] Q. Before March 15th when did you start?

A. The first time I worked for him?

Q. Yes.

A. I don't know.

Q. Calm down and don't be frustrated.

TRIAL EXAMINER: We are not talking about the first time three or four years ago, we are, counsel is asking you before March 15 when was the time you started to work for him, the time you were employed up to March 15, at that time when did you start.

A. Just two or three weeks before that, before I signed the card.

Q. (By Mr. Jones) Back before that how long had it been?

A. Quite a while since I worked for him.

Q. What type of work do you do?

A. I am an apprentice helper.

Q. You were working there when your brother Bill came to work?

A. Yes.

Q. Before he came to work there?

A. Yes.

Q. Just tell us what took place, I believe it was the afternoon of March 15th, that you have heard testimony about here. I would just like to have you say exactly what took place during that meeting.

A. When Wesley Smith come in?

[209] Q. Yes, and when he asked you if you and the other boys something about joining the union.

A. He said, "Would you boys like to join the union?" He said something about District 50. I didn't hear anybody answer anything, and then he said, "There it is, Bob."

Q. He said, "There it is, Bob"?

A. Yes.

Q. At any time after that did you, prior to, well, within the next week after that, did any of you go up to Bob and say that you had changed your mind about joining District 50, that you wanted to join another union instead?

A. Did anybody? I don't know. I didn't.

Q. When Jack Moore and Ray Edwards spoke with your group at the union hall, I believe March 18th the testimony was, had various ones of you sign cards, just tell the Trial Examiner what was said by Mr. Moore, Mr. Edwards, before the men signed those cards.

A. Well, when I first come in Jack Moore wasn't in there, Mr. Edwards was the only one. He showed each one of the men the cards, and, you know, they was asking questions about the cards, and he showed them one. He said that they would definitely get a Class A card. Then Jack Moore come in, I think it was about 4 o'clock, I'm not sure, and we signed the cards and turned them. We had a discussion for awhile, asking questions [210] about one thing and another.

Q. What do you mean by Class A card, so we understand?

A. I really don't know what a Class A card is, I don't know how to explain it. You know, it is a union card, Class A.

Q. Is that a classification the union has given for their journeymen electricians?

A. I think there are different classes, I am not for sure, probably so.

Q. Would that classification under the union contract receive a higher rate of pay than the other employees?

A. Yes, sir, I imagine so, different types of work or something.

Q. Did Mr. Moore and Mr. Edwards promise you a Class A card if you joined the Union?

A. Me personally?

Q. Yes.

A. They was talking to all of us who signed it.

Q. Did Mr. Moore and Mr. Edwards say anything about what the purpose of these cards were like you had and as has been introduced in evidence here? Did Mr. Edwards say what the purpose of these cards were?

TRIAL EXAMINER: By these counsel is now hold out to the witness one of the Exhibits 3.

A. To the best of my knowledge it was to represent us,

and there would probably be an election with a vote on how we wanted it and without them knowing [211] how we voted.

Q. (By Mr. Jones) Is that what you understood the purpose of the cards to be, to obtain an election?

A. Yes, well, yes, sir. That didn't mean we was joining a union by signing that card, isn't that right?

Q. Were you present in the courtroom this morning when Mr. Moore testified?

A. Yes.

Q. And, of course, the record will reflect what he said and the questions I asked him, but for the record I believe he testified himself that he said that, that if Mr. Scrivener didn't bargain he was going to ask for an election.

TRIAL EXAMINER: I think the record will probably show that Mr. Moore testified that he was prepared to show the cards to Mr. Scrivener and if Mr. Scrivener refused to bargain they could use the cards to go to an election.

MR. WALSH: He said that they could go that route, those were his exact words.

MR. JONES: We can introduce Mr. Moore's statement. I think I want to just to show, since there has been some statement on the record that this witness might be guilty of perjury I feel I owe it to him, and also for the purpose we got into all the statements. I think Mr. Moore's own testimony shows—

TRIAL EXAMINER (interrupting): I am sorry. I don't understand [212] stand.

MR. WALSH: It wasn't even marked.

MR. JONES: That's right.

MR. WALSH: He had the statement.

TRIAL EXAMINER: I am not sure what you are asking, counsel.

MR. WALSH: There is no suggestion that there is anything in that statement inconsistent with Mr. Moore's testimony. We are now going back into whether his testimony was inconsistent. If ever there was any testimony that was inconsistent it is his (indicating).

MR. JONES: I was actually just trying to tie the record together here. I do want to introduce that portion of Mr. Moore's statement in support of my motion to strike all of the testimony of this witness up to this time.

TRIAL EXAMINER: You haven't made a motion to strike.

MR. JONES: I was just preparing to do that. I would move to strike this witness's testimony at this time, that the General Counsel was permitted to ask leading questions of this witness on the grounds he was a hostile witness. He said when he signed the card he understood it was to obtain an election, and that was the time the witness was then declared hostile. He was declared hostile because that was not in the statement he gave the Labor Board. I think Mr. Moore's own testimony this morning shows the statement he gave the Labor Board man was incorrect or [213] incomplete or out of context, because what this man testified on the stand was entirely consistent with what Mr. Moore testified to himself this morning.

TRIAL EXAMINER: Are you telling me now that the witness has testified just not consistently with Mr. Moore's testimony this morning?

MR. JONES: It is not inconsistent with what Mr. Moore said.

TRIAL EXAMINER: I resolved that on direct testimony, and that is as far as we go.

MR. JONES: I want to make a motion to strike the witness's testimony.

TRIAL EXAMINER: How could I strike the witnesses' testimony, counsel? That would be very inconsistent on my part, wouldn't it? You have asked me to say that what this witness has testified to is consistent with what Mr. Moore said this morning, and at the same time you are asking me to strike what this witness said.

MR. JONES: I am asking it be stricken because it was all leading questions, on the theory that the witness was hostile when he said something this afternoon that was consistent with Mr. Moore's testimony this morning.

TRIAL EXAMINER: My recollection of Mr. Moore's testimony must vary quite a bit from yours, because what this [214] witness testified to and what Mr. Moore testified to, I think, are completely different. In fact, I think there is one part of this witness's testimony that you are overlooking. The question asked by counsel for the Charging Party about this point, and the answer that this witness gave just a moment ago was that Mr. Moore's statement this morning was the statement he made when he was in the meeting, that is, that the cards would be shown to Mr. Scrivener. I

don't know whether he admits that or not, but that is what this witness said.

MR. JONES: I have made my motion for the record.

TRIAL EXAMINER: Your motion is overruled.

MR. JONES: Let me see the statement of this witness.

Q. (By Mr. Jones) You have been questioned concerning General Counsel's Exhibits Nos. 4 and 5. I believe you stated earlier in my voir dire that this is not in your handwriting, General Counsel's No. 4?

A. Yes.

Q. Does General Counsel's Exhibit No. 4 contain everything that you and Mr. Tyrus Frerking talked about on the evening he talked with you?

MR. WALSH: I object. I suppose this is what you would call voir dire, but I certainly object to this. I think it is repetitious.

TRIAL EXAMINER: It sounds like second voir dire to me, and the affidavit is already in evidence.

[215] MR. JONES: Can't I cross-examine on it to show it is not a complete version?

TRIAL EXAMINER: I don't think this question was asked on voir dire. I will allow you to ask it.

A. Jack Moore did say the cards were to—

Q. (By Mr. Jones—interrupting) Just address yourself to my question. My question is merely is that statement there a complete representation of everything you and Mr. Frerking talked about on the evening you signed that statement.

A. Is this (indicating) everything we talked about?

Q. Yes.

A. No.

Q. What did Jack Moore and Ray Edwards say to you about the purpose of your signing those cards? I am not sure I have it straight and I want you to tell it as accurately as you can, leaving out of your mind anything about being represented.

A. They said the cards would give them the authority to represent us, you know, to represent us. The way I understood it was that we would take it to an election.

MR. FRANCKA: I object to what he understood or his conclusions. This should be confined to what was said and represented.

TRIAL EXAMINER: What we have to take from you is the best recollection you have of what was said.

[216]. THE WITNESS: That is what I was saying.

TRIAL EXAMINER: You see, when you use the word understand you are making it a conclusion in your mind.

A. They said they would represent us and we would probably go to an election and we could vote however we wanted to.

Q. (By Mr. Jones) Did he say anything about whether or not he would show the cards to Bob Scrivener?

A. I think he did say that.

Q. But that is not in your statement, Mr. Frerking didn't put that in your statement, did he?

A. No, sir.

Q. Did you work out on the apartment house project on South Florence?

A. Yes.

Q. Was the union pickets there when you were working there at that time?

A. Yes.

Q. Do you know whether this caused your job to be shut down there and men to walk off the job there?

A. I don't know.

Q. Did you talk to Mr. Frerking the first time April 18, 1968?

A. Yes.

Q. Did you talk to him before or after the other gentlemen had talked to him?

A. Before what?

[217] Before or after he had questioned the other men as you testified here today?

A. I was the last one he talked to.

Q. And who was the first one?

A. I couldn't say for sure. I think it was "Bud" Wilson.

Q. Did your brother talk with Mr. Frerking before you did?

A. No, he didn't even talk to him that night I don't believe.

Q. Had you talked to your brother Bill after this before you went down there that night?

A. About it?

Q. About the statement you were going to make.

A. He come by and got me and took me down there.

Q. Your brother Bill took you down there?

A. Yes.

Q. Why didn't he come up himself, Mr. Frerking?

A. I don't know.

Q. Why didn't Bill come up himself?

A. He was there.

Q. Bill was there?

A. Yes, sir.

Q. Did he sign a statement for the Labor Board man?

A. No. It was getting late and he didn't talk to him that night.

Q. The afternoon I came out there, the first time you saw me was in the afternoon of March 19, wasn't it?

A. Yes.

[218] You didn't even know me before that time, did you?

A. No, sir.

Q. Can you tell the Trial Examiner exactly what occurred that afternoon?

A. I have already. Wesley come in—oh; no, that was another time. You said Mr. Scrivener didn't come under the—I can't think of it.

MR. WALSH: The Labor Board?

THE WITNESS: He didn't use that word.

Q. (By Mr. Jones) Jurisdiction?

A. Yes. You was talking about the sheet metal union and the initiation fees, and you said you didn't know for sure but the electrical local may be about the same. I don't remember what you quoted on the price of that, I wasn't really paying much attention.

Q. Do you remember Mr. Scrivener gave some of the men, offered to give checks to any of the men?

A. Yes, sir.

Q. Do you remember how he explained that?

A. He gave Bill, "Bud" and Wes, I believe it was, their checks. Al asked him, he said, "Am I fired?" He turned to you or something, and then, I believe, you said, to the best of my knowledge, [219] you said if they wasn't satisfied with their jobs they could go up to the union hall and maybe they could place them up there. When they left, like the rest of them said, Bob told them they could come back to work the next morning if they wanted to.

Q. Were you around the next morning when they came back, hear anything that was said the next morning?

A. I don't believe I worked the next morning.

Q. You didn't work the next day?

A. I don't believe I did. I am almost sure I didn't work that day.

Q. Do you know why that was?

A. I think I was sick or something. I know I missed two or three days. I think that was one of them. Is that the day they come back and loaded their truck and left? Is that the day you are referring to?

Q. I am referring to the day right after I was out there the evening before. Were you at work the next day, the 20th, I believe it would be, of March?

A. I think I worked that day. The day I wasn't there was the day they went back and started work.

TRIAL EXAMINER: The testimony so far has indicated that that is the 20th of March. Your testimony is you weren't there that day?

Q. (By Mr. Jones) You weren't there that day or you don't know?

A. No.

[220] Q. Did you work any that week, if you recall, the week of the 20th? You were off just one day with a sore throat?

A. I believe so.

Q. So the 21st was on a Thursday and the 22nd on a Friday and you think you worked both of those days?

A. I think so.

Q. What about the next week, the week of the 25th? Do you think you worked that week or do you recall?

MR. WALSH: I object to this. They have records of when he worked, and if they want to pull them in I am not going to object to them. He can't remember all those dates.

TRIAL EXAMINER: I don't know whether he can or not, but I don't know what the relevancy is.

MR. JONES: I am asking him if he does remember.

TRIAL EXAMINER: For what purpose?

MR. JONES: Just to make a full record.

TRIAL EXAMINER: I don't need a full record as to whether he remembers whether he worked or not.

MR. JONES: I am just trying to cover things that have come up.

TRIAL EXAMINER: Counsel, I don't see where this is relevant.

MR. JONES: It is really a foundation for other questions [221] I have.

TRIAL EXAMINER: Let's get to those and see what happens.

MR. JONES: It is difficult for me to get at them without doing it that way.

TRIAL EXAMINER: Let's go along and we will see.

Q. (By Mr. Jones) You weren't laid off, you didn't consider yourself laid off on the 19th or 20th or 21st, in there; that is really what I am getting at.

TRIAL EXAMINER: Counsel, there is no allegation that he was, so why are we going into it. The only allegation here is as to April 18th, as to this witness, and the witness has also covered something under paragraph 4. Those were the material points. I don't see that it is material that he didn't consider himself laid off at another point where it is not alleged.

MR. WALSH: Of course, he wasn't laid off. I will stipulate to that.

TRIAL EXAMINER: I don't see where it is material or relevant or anything else.

Q. (By Mr. Jones) Did Mr. Scrivener ever interrogate you, ask you questions about what you had told the Labor Board man at any time?

A. No, he didn't talk to me about anything like that at all.

Q. Did I ever ask you anything about what you told the Labor Board Man?

A. No.

[222] **MR. JONES:** I believe that is all.

TRIAL EXAMINER: Any redirect?

MR. WALSH: No questions.

TRIAL EXAMINER: Thank you.

[223]

City Council Room,
City Hall,
Springfield, Missouri,
Wednesday, June 26, 1968

[231] **MR. WALSH:** Well, I would propose to stipulate, Your Honor, the following data with respect to jurisdic-

tion. I would first propose to stipulate that during the calendar year of 1967 the respondent's gross revenues were \$68,938.81.

TRIAL EXAMINER: Do we have a stipulation?

MR. JONES: Yes, we will stipulate that was the total receipts for the year.

TRIAL EXAMINER: All right, stipulation received.

MR. WALSH: I would further propose to stipulate that during the calendar year of 1967 the respondent's total purchases from Gray Bar Electric Company for goods and materials associated with electrical contracting work were \$23,126.62.

MR. JONES: Yes, we'll stipulate.

TRIAL EXAMINER: All right, stipulation received.

MR. WALSH: I would like to call Mr. Griffin to the stand, please.

GEORGE A. GRIFFIN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

THE WITNESS: My name is George A. Griffin. My home address is 2317 South Oak Grove, Springfield, Missouri.

TRIAL EXAMINER: All right.

DIRECT EXAMINATION

Q. (By Mr. Walsh) Mr. Griffin, what interest do you have in this case? How did you get involved?

A. I was asked [232] to provide certain information by yourself. I was approached yesterday.

Q. What is your position, Mr. Griffin?

A. I'm the branch manager of the Gray Bar Electric Company's branch office in Springfield, Missouri.

Q. How long have you occupied that position?

A. In Springfield, the past 13 years.

Q. Were you a branch manager before that?

A. Yes, sir, I was.

Q. For how long?

A. Two years in Sioux City, Iowa.

Q. As a branch manager, is there anyone in the Gray Bar operation in Springfield who is superior to you?

A. No, there is not.

Q. Would you briefly describe your duties for us, Mr. Griffin, what you do?

A. Well, I'm responsible for the operation of Gray Bar's business from this branch of Gray Bar Electric Company. They are wholesale electrical distributors who are actively engaged in the sale and distribution of materials to electrical contractors, municipalities, REA projects and utilities.

Q. Give us some idea of the size of the Gray Bar Electric Company. Is it nationwide?

A. It's nationwide with 147 locations in the United States.

[234] Q. (By Mr. Walsh) Now, Mr. Griffin, subsequent to the problems that the Examiner just discovered, did you receive permission to come here and testify?

A. Yes, sir.

Q. Tell us how that came about.

MR. JONES: Objection.

TRIAL EXAMINER: I don't think it's necessary, counsel. The witness is here to testify and unless he is going to raise some objection to testify I'll presume he is authorized to testify. So, let's move on.

Q. (By Mr. Walsh) Who is your superior, Mr. Griffin?

[235] A. My superior is a gentleman by the name of J. E. Bevers.

Q. What is Mr. Bevers position?

A. Mr. Bevers is district manager of the midwestern division of Gray Bar located in Kansas City.

Q. Tell us what relationship you have with Mr. Bevers in terms of exchanging information.

A. Well, I confer with Mr. Bevers on a regular basis, no particular routine basis, but he is responsible for the overall operation of this district. I report directly to Mr. Bevers and we frequently confer regarding any business.

Q. Does Gray Bar Electric Company do business with Robert Scrivener of Springfield, Missouri?

A. Yes, sir, we do.

Q. Where are the accurate and official records kept reflecting the business that Gray Bar does with Mr. Scrivener?

A. The accurate and official records on all accounts we handle out of Springfield are maintained at our district office in Kansas City.

Q. Do you have those records in your possession at this time?

A. The official records?

Q. Yes, sir.

A. No, sir, I do not.

Q. Did you have a discussion with Mr. Bevers concerning these records?

A. Yes, a brief discussion, yes, sir.

[236] Q. When did you have this discussion with him?

A. Yesterday afternoon about 4 o'clock.

Q. Did you ask Mr. Bevers for any information based on those records?

A. I did not ask him, he volunteered a certain amount of information.

Q. Did he tell you what gross business of Robert Scrivener for the year 1968 is to date?

MR. JONES: Objection, hearsay.

MR. WALSH: I haven't asked him yet. I just asked him if he told him.

TRIAL EXAMINER: Go ahead.

Q. Did he tell you?

A. He gave me a figure, yes, sir.

Q. All right, what was that figure?

MR. JONES: Objection, hearsay.

TRIAL EXAMINER: Overruled.

Q. What was Mr. Scrivener's gross purchases to date for 1968?

A. According to the figure Mr. Bevers gave me over the phone yesterday, approximately \$18,000.

Q. Now, Mr. Griffin, you said that you don't keep official records of the company here, is that correct?

A. Correct.

Q. Would you tell us, please, what records you do keep here locally of purchases, of course, I'm talking about, or sales [237] to customers?

A. Well, we keep, with no complete accuracy, a pentaflex file or branch house copy, but it is not necessarily accurate. It is not audited, for example.

Q. When you say it's not accurate, do you mean that the figures on any one slip are not accurate?

A. The figures would be accurate.

Q. But you could not state that the whole set is here?

A. That is correct.

Q. What are these records? Can you describe what they are physically? I know they are pieces of paper.

A. Yes, they are copies, for example, of what we call our shipping and charge tickets.

Q. What data do they reflect?

A. The name of the name of the customer, the material purchased, the date, signatures, normally, of whoever picks it up and the selling price.

TRIAL EXAMINER: Let me understand one thing at this point. The records that you maintain, I just want to be sure at this point of this matter, you say they are not necessarily completely accurate. Is that on the basis that you might not have all of such copies or tickets?

THE WITNESS: Yes, sir, correct.

TRIAL EXAMINER: In other words, what you would have would be at least a portion of what a particular purchaser purchased.

[238] THE WITNESS: Correct, yes.

Q. (By Mr. Walsh) Mr. Griffin, did we meet this morning?

A. Yes, sir.

Q. All right, now, tell the court what we did this morning, please.

A. Well, briefly—

Q. (interrupting) Maybe I'm not clear. In terms of these records.

A. At your request we examined a portion of the pentaflex copies that reflected Mr. Scrivener's purchases from us during 1968.

Q. Could we get those records out, please, Mr. Griffin? Mr. Griffin, did we total some figures while we were at your office this morning?

A. Yes, sir, we did.

Q. Could you tell us, please, what invoices we totalled?

A. We totalled the May purchases. As a matter of fact, back to the 21st day of March and then you said we were out of time, so we stopped there.

Q. In other words, when we started we had a pile of invoices, is that correct?

A. Yes, sir.

Q. We went through them and totalled them between certain dates and then we ran out of time.

A. Right.

[239] Q. Would you tell us, please, what are you holding in your hand, Mr. Griffin?

A. This is a tape that was taken off of our pentaflex copies.

Q. Will you tell us the dates that the invoices reflected on that tape were included?

A. Well, March 21 to May 9.

What are the total purchases reflected on that tape?

A. This reflects \$4,769.33.

Q. Mr. Griffin, when looking at the invoices are you able to tell what particular goods were purchased by looking at the invoice?

A. Yes, sir.

Q. I told you this morning, did I not, that you would have to testify about the origins of certain goods, is that correct, point of manufacture?

A. Yes.

Q. How did we approach determining this this morning?

A. Well, you asked me on specific items based on my knowledge, of our company's operation, as to where certain things were manufactured.

Q. How did we pick the invoices to look at?

A. They really were not selected. We just started at the top and went down through the invoices. There were no definite selections made.

Q. I would like to hand you the copies, that we have discussed, of the invoices that we had time to look at this morning [240] and ask you if you would just describe a few of those for us and where the goods came from.

MR. WALSH: Could we go off the record for a second?

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

Q. (By Mr. Walsh) Would you look at these invoices and give us the date of them, tell us what was purchased and where the goods came from?

A. On April 22 there was a purchase of six 40 watt fluorescent lamps and two pairs of pliers. The lamps would have been manufactured in Cleveland, Ohio, and the plain pliers in Chicago.

Q. Would you continue on?

A. On April 17 there were four items: inch and a quarter thin wall conduit, couplings, connectors and Greenfield. The

conduit would have been out of Pittsburg, Pennsylvania. The couplings out of Chicago. The Greenfield conduit, this is assumptive, I think would have been Chicago, at least that is normal. On April 16 a quantity of Starlight fixtures manufactured in Kentucky. On April 17 two items of Starlight from Kentucky and one from Lasonia in Tennessee on the fixtures.

Q. Mr. Griffin, did you have an opportunity to inspect all of the invoices that you have at the office for 1968?

A. No, sir, not all of them.

[241] Q. Did you have an opportunity to go through more than we have here?

A. Yes.

Q. Are the examples we have been talking about here representative of the other invoices which you did have an opportunity to inspect?

A. Yes, sir.

Q. Now, based on the information you have gathered from looking at this data, these invoices, and based upon your experience in this business, are you able to tell us how much or what percentage of the purchases of Robert Scrivener for, say, the year 1968 would have been manufactured outside the State of Missouri?

A. Yes, I would say 90 per cent.

Q. Would this statement also apply to 1967 purchases?

A. Yes, it would, that's right.

MR. WALSH: That's all I have, Your Honor.

TRIAL EXAMINER: Anything further?

MR. FRANCKA: I have nothing further.

MR. JONES: No questions.

TRIAL EXAMINER: Let me ask you this, I think counsel may have covered it, but I want to be sure we go into this area well. We are considering here the question of Mr. Scrivener's business, mainly wiring and fixtures, electrical work in a residential area and apartment houses, in the complement of goods [242] Gray Bar maintains here, let's say the fixtures, wiring, conduit, the necessary fixtures for roughing in or in finishing, can you tell us from your knowledge the goods that are kept in stock at Gray Bar, what amount of those goods are manufactured in Missouri and what comes outside the state?

THE WITNESS: Well, I believe it would be reasonable to say that probably 5 per cent or less which we have in our

warehouse or stock would be manufactured in Missouri and 95 per cent would be manufactured outside the State of Missouri.

TRIAL EXAMINER: Can you tell me what others are manufactured in the State of Missouri?

THE WITNESS: Well, we do have some items in switches, the technical terminology is squared E line, that is manufactured in Missouri. We, also, have a line of conduit pipe products which are nipples, couplings and so forth which are manufactured in Kansas City. We have Williams fixtures which are manufactured at Carthage, Missouri. We handle a few of another manufacturer that is fabricated in Kansas City. That would be the extent of it.

TRIAL EXAMINER: For instance in the couplings, are these goods intermixed with couplings that would come from other manufacturers?

THE WITNESS: It could be, yes, sir.

TRIAL EXAMINER: Is there any way, I would presume that lighting fixtures as such would be separate by manufacturers [243] like appliances.

THE WITNESS: Yes, sir.

TRIAL EXAMINER: But in something like nipples or wiring is there any effort made by Gray Bar to keep such things separate by their manufacturer or is it done on another basis?

THE WITNESS: Well, for example, say in couplings and nipples they are not kept separate stock-wise. In other words, to us a one inch nipple is a one inch nipple regardless of who made it. We do in Kansas City maintain, say, a separate record regarding who that was purchased from and we can tell from that end, but physically we could not, perhaps, tell.

TRIAL EXAMINER: In other words, when you are requested for a supply here of one inch couplings, can you tell by looking at the one inch couplings who they came from?

THE WITNESS: No, sir.

TRIAL EXAMINER: No effort is made to maintain them separately by origin?

THE WITNESS: Yes, no such effort is made.

TRIAL EXAMINER: Is what you said true of any of the other things that you have in stock?

THE WITNESS: Well, I would say most of the rest of the items are easily distinguishable by appearance or by the

cartons in which they are packaged. We do keep those items separate.

TRIAL EXAMINER: Well, is that true of conduit, cable [244] or various grades of wire?

THE WITNESS: We keep the wire separate and, also, the conduit separate.

TRIAL EXAMINER: On what basis is it kept separate? Is it kept separate on the basis of manufacturer, price or what?

THE WITNESS: Manufacturer.

TRIAL EXAMINER: Do you get requests for the conduit or wire by the manufacturer?

THE WITNESS: Frequently, that's why we keep them separate. Various contractors have preferences for various manufacturers.

TRIAL EXAMINER: All right. Anything further?

MR. JONES: Nothing further.

* * *

MR. WALSH: General Counsel rests.

TRIAL EXAMINER: All right.

MR. JONES: At this time, Your Honor, I would move to dismiss the complaint in this case in its entirety on the grounds that there is shown to be no jurisdiction in this matter before the Board under its jurisdiction standards. As I understand, the authority of the General Counsel is that he seeks to invoke the rule of the case of Peterson versus NLRB 234 F. Second 417.

MR. WALSH: Could I ask counsel where you got that understanding?

[245] MR. JONES: That was my understanding.

MR. WALSH: I gave you that citation, but I don't think I said that was my whole line.

MR. JONES: It is my understanding that the theory in which it is sought to have jurisdiction asserted by the Board here that there is an allegation of an 8(a)(4) violation and that that is the theory on which the Board has sought to invoke jurisdiction here. In spite of the fact that they would not ordinarily assert jurisdiction of an employer of this size under their own jurisdictional standards and I can find no testimony in searching my recollection and my notes which would show or even approximate a case of an 8(a)(4) violation. In fact, under the Board law, Board

cases, the evidence presented in this case could not show an 8(a)(4) violation.

Further, I think that if the Board were to assert jurisdiction against this employer it would be in violation of the federal due process of law and equal protection of the law under the United States Constitution to take jurisdiction of this employer and not to take jurisdiction of other employers of the same situation. I would ask the Trial Examiner to rule on this motion and if this is overruled I would like to make more specific attacks on the complaint before I proceed with that evidence, if that be permissible.

TRIAL EXAMINER: Well, I think I would rather hear all of your support.

[246] MR. JONES: I will move to strike Paragraph 4A of the complaint on the ground that there is no showing of any violation in evidence, no prima facie showing of any violation of the Act by any illegal pressure or intimidation asserted on anyone of the employees who testified and admit that no pressure was put on them to join District 50, which I assume the complaint refers to and they won't say. I don't think there is any evidence that there was any violation charged there. For the same reason, I move to strike and dismiss Paragraph 4B, that there is no polling of employees. I would move to dismiss Paragraph 4D on the ground that the only testimony in the record was by one or two of the men to the effect that, as I recall, they had been to a meeting with a Labor Board investigator, Tyrus Frerking, on the evening of May 17, 1968, and the only testimony in the record is that Bob Scrivener, the respondent, made a statement to and in the presence of two that we have heard testimony from, if it were believed that he himself had spent several hours with the same investigator the previous day and that you sure couldn't find out anything from him. Or did you fellows find out anything last night? As I recall that was the only testimony about anything Bob Scrivener is alleged to have said about any Labor Board investigations of any of his employees. I cannot recall any other evidence on that. That is not a violation of the law. I have never seen a case, at least, that says it's a violation of the law to make [247] a statement like that, which is merely the passing of the time of day.

I move to strike Paragraph 4F of the complaint on the ground that there is no evidence to support that. The only

evidence on that is the alleged telephone call, which I do not believe is a properly authenticated conversation.

I would move to strike Paragraph 5A and 5B, 5C, 5D and 5E of the complaint on the ground that there is no evidence making a Prima Facie case of those allegations. I don't think there is any substantial evidence that William Cockrum, George Smith and Albert Wilson were discharged on March 19 and 20 or either one of those days because they had admitted their admissions. They might have stated it in one place, but I think in their admissions in cross-examination showed the true light in which the statements that they testified about were made and that it shows all their testimony together and consider it together that these men were not discharged. Further, the letter dated March 22 that these men admitted receiving removes any doubt about the matter as it effectively communicated to them that there was never any intent to discharge them. This was made at the earliest date possible after it was realized that there was a claim of discharge and it should remove any doubt about the matter. They admit receiving the letter. On March 27, Paragraph 5B about George Smith and William Cockrum. The employees themselves testified as to how that came about, that Mr. [248] Scrivener told the boys that he could use one during the next day and he decided to let them settle who it was going to be. They suggested drawing match sticks or draw for it. William Cockrum stated that he told Mr. Bob Scrivener to draw for him and they were drawn for and those two boys were the ones that did not work.

April 18, Paragraph 5C, there is not any evidence of any discriminatory motive for the lay-off on April 18, 1968, of Bill Cockrum, Albert Wilson, George Smith and Claude Sanders, for the alleged reason that they met and gave evidence to an agent of the Board in conducting an investigation for the Board on the charges filed herein. There is no evidence to show, there is no evidence in the record right now as it stands to show that Bob Scrivener knew who had talked to the Board agent and who had not. Without some evidence of knowledge I do not see how that they can contend that we have discriminated or laid off the men because they met with the Board agent when there is no evidence of any communication to Bob Scrivener of who met with the Board agent and who did not meet with him. For that

reason I think Paragraph 5E should be dismissed, also. Since it's predicated on 5C.

TRIAL EXAMINER: Counsel, that last point doesn't seem to necessarily follow because 5E is pleaded as a separate violation. It is not necessarily predicated on 5C. Paragraph 5E charges a refusal to re-employ the same way 5D does. I'm sure you have seen cases where, in Board law, someone has been discharged possibly and appropriately in a legitimate manner, but [249] then the employer has been held guilty for refusing to hire or reinstate him in line with what appears to be the considerations.

MR. JONES: I'll admit that it will apply to lay-offs which was worked on April 18 and March 27. I'll admit that that wouldn't go out for that reason although I don't think there is any evidence to show any discriminatory purpose on behalf of Robert Scrivener in this case in not calling these men any sooner than he has.

On the point of, since it is my understanding that the General Counsel is seeking the Board to assert jurisdiction here on the basis of the complaint 8(a)(4) violation and I think this should dispose of the whole case. There should be no need for me to take it any further.

If I might, this is the theory of General Counsel, 8(a)(4) says "it shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act "that has been construed both by the Board and the courts to mean that giving testimony does not refer to preparation of the testimony, but refers to testimony in the Board hearing." That proposition is upheld in several NLRB cases. I do not purport to have all of them, but Opal Protection Service, 149 NLRB No. 50, 1964 [250] case, now the excerpt that I have written down here from the LBRM service is as follows, I may have not written it down verbatim. "Although discharge of Gar slated to testify in three days file an 8(a)(3). It does not come under the precise language of 8(a)(4) since the Gar did not file unfair labor practice charges and at the time of his discharge had not given testimony under the Act."

Now, there are other cases. There is a Circuit Court of Appeals case which is right on the point, NLRB versus Ritchie Manufacturing Company. I do not have the federal circuit citation on that I don't believe.

TRIAL EXAMINER: Do you have the LRRM citation?

MR. JONES: Yes, the 61 LRRM 2013 and I would refer specifically to Page 2021 where, this will be a brief excerpt here, "Respondent contends that the Board failed to sustain its pertinent proof in support of its contention that Feltz was discharged because he gave testimony and filed charges under 8(a)(4) of the Act set out as FMI. The primary reason for this is that in fact no testimony was ever given or charges ever filed by Feltz against respondent. The most that Feltz did was to prepare to testify against respondent by attending the meeting at the motel in Marshalltown on July 9, 1963. The cases dealing with giving testimony have invariably involved situations in which an employee has actually testified at a hearing. We are reluctant to hold that 8(a)(4) can be extended to cover preliminary preparations for [251] giving testimony and neither his brief or his oral argument before the courts as counsel for the Board suggest that we make such an extension. We note that the proven violations in 8(a)(3) and (3) of the Act stand independently, however, and do not fall by the Board's failure to prove that respondents violated 8(a)(4) of the Act." I would strongly urge the case to be dismissed at this time.

TRIAL EXAMINER: Do you want to be heard?

MR. WALSH: I beg your pardon.

TRIAL EXAMINER: Do you want to be heard?

MR. WALSH: Well, I think the evidence in Paragraph 4 is overwhelming and I'm not going to make any comments on that. It's overwhelming in respect to 5A. If nothing else the other allegations in Paragraph 5 are supported by a number of factors including the fact that during all this time less senior employees and no employees were working steadily. With respect to the 8(a)(4) allegations, first of all with respect to the cases which respondent cites, I don't have my research on that point with me and I wish I did. There are two ways to distinguish the cases that he has cited so far with respect to the men in this case. One is the fact that these people were alleged discriminatees to begin with and in effect they had filed the charges although the union was the formal charging party. Secondly, neither one of the cases cited by respondent dealt with the fact of the witness giving his [252] deposition to the Labor Board. I think that the evidence on this is clear that among a

number of factors there was knowledge of this and there was time and also it is very interesting to note that the five card signers on April 18, on the evening of April 18 the four remaining union people were laid off.

I'm just trying to cite these things. We don't have any direct testimony at this time and this is the reason I did this.

TRIAL EXAMINER: Well, Section 8(a)(4) does give a lot of people some trouble and I think it gives me some trouble as to exactly what it encompasses. I note in one case, that was the Ackabauchie case we spoke of earlier concerning the exercise of jurisdiction, and I looked at that case and I saw one particular phrase which is "Whereas here the substance of allegations and complaint charges interferes with the statutory right of an individual to resort to the Board's processes, public policy requires that the Board exercise jurisdiction to the fullest extent." A number of cases were cited from that. There is a question in my mind just where 8(a)(4) goes. I am presuming without hearing yet the General Counsel's argument will go to the line that where the initial step has been taken, the filing of charge, that the Board must protect its processes from thereon.

MR. WALSH: Yes, sir, and if ever there was a case I think on this evidence as it stands now for five individuals are trying to afford themselves the protection of the Act when they [253] are continually harassed and discharged. Finally, the night after they gave statements the only four surviving union adherents are laid off. If this isn't a case of people being frustrated and trying to assert their laws, their rights under a statute I don't know what it is.

MR. JONES: Are you contending 8(a)(4) or 8(a)(3)?

MR. WALSH: 8(a)(4).

MR. JONES: How can you contend 8(a)(4) when there is no evidence that my man even knew that they talked to the Board agent?

MR. WALSH: I disagree with your interpretation of the evidence on that, Mr. Jones. He only interrogated two of them.

TRIAL EXAMINER: I think that particular point needs briefing from both of you and I'll rule out all the help I can get in this regard because it is not a point that I'm going to recite right now. I do not think I could give justice to it. I'm going to reserve the ruling on your motion and my decision will, in effect, contain the ruling because I'll either

be deciding for or against you in the decision. This is a very particular point that I feel needs all the help I can get.

MR. WALSH: I agree with you. I'm not saying it's an open and shut case.

TRIAL EXAMINER: I don't think its open and shut either way. I can see where a literal interpretation of language might foreclose an 8(a)(4), but I'm not positive, and particularly from the Board cases that I have seen, that a literal interpretation is [254] the proper interpretation for the 8(a)(4) language.

MR. JONES: Even leaving that to the side there is no evidence or knowledge of who testified or who talked to the Board agent.

MR. WALSH: Well, let's just look at this evidence if you want to.

TRIAL EXAMINER: I think your point is something that is proper for briefing.

MR. WALSH: All right.

TRIAL EXAMINER: I recognize there was some interrogation of it, but I, also, recognize this is a small company. There are a number of points that can be brought up on either side and I expect you to do so. Let's move on.

[255]

ROBERT SCRIVENER

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated and give us your full name and address, please.

THE WITNESS: Robert Scrivener, Route 12, Springfield, Missouri.

DIRECT EXAMINATION

Q. (By Mr. Jones) What is your business, Mr. Scrivener?

A. AA Electric Co.

Q. You are the respondent in this case?

A. Right.

Q. How long have you been in that business?

A. About three years.

Q. Prior to that, what did you do?

A. Immediately prior to that, I worked for Aton Luce Electric Company and prior to that, I worked for the Federal Government for eight years.

Q. For how long?

A. Eight years.

Q. Where was that?

A. In Springfield.

[256] Q. Sir, you have been an electrician for a considerable time?

A. Since 1936.

Q. As such, did you belong to a union?

A. Yes, I did.

Q. What was that?

A. I belong to Local 453 in Springfield, Missouri, and Local 1002 in Tulsa.

Q. Of the International Brotherhood of Electric Workers?

A. Yes.

Q. Now, did you have a meeting with—well, let me ask you this. First of all, did you have a meeting with Jack Moore, the business manager of Local 453 of the IBEW, here in Springfield about March 19th?

A. Yes, I did.

Q. How did this come about?

A. Well, Mr. Moore called me the evening before and asked me to come up and talk to him and I did not ask Mr. Moore the nature of the meeting or anything about it because I had known him for a number of years and we had been pretty good friends. So, I went up the next morning. I believe we had the meeting set up for 8:30 and I believe I went up there about 8:15. Mr. Moore was in and I went in to talk to him.

[257] Q. All right. Would you tell what happened at that meeting?

A. Yes. The first hour of the meeting was just like Jack said. We just talked about informal things and different things that pertained nothing to this case, just like friends would do. About 9:30, I told Jack that I had an appointment with the doctor. I said, "Did you want to see me about something," and he said, "Yes." He wanted me to sign a contract with the union. I told Mr. Moore that I did not know if I could right at this time and he said, "Well, you're just as well to because all your men signed up." I told him that I didn't believe this because I had no word of it and he threw out those five cards that Your Honor, I think,

has and looked at them. I glanced at the cards. I didn't read them—I'm going to be honest with you—I just looked at the signatures. I told Mr. Moore that I did not believe those were those boys' signatures. I did not think they had signed those cards or I would have heard something about them signing them.

He said, "Well, you'd just as well sign a contract," and I said, "Jack, I cannot right now but if you'll get me a contract," just like he told it, "I'll take it down to Mr. Appleton, my attorney, and let him read it over. I do not understand these legal things." He got Mr. Edwards to go and get me an NECA contract, which you have there in your file, and—

[258] Q. (interrupting) Yes, sir. Are you referring to the document that has been marked Respondent's Exhibit 4?

A. Yes, this is correct.

Q. Now, just to explain it for the record, that writing on the front, "Don Jones," did you put that writing on there later after you received the document from Jack Moore?

A. This is correct.

Q. Is that the contract that he asked you to sign?

A. Yes, sir.

Q. Did he ever make any other contract proposal of any type to you?

A. No, sir, he did not. At this time?

Q. Yes, on the March 15th date or since that time.

A. Yesterday morning he asked me to sign a contract again, right here in the hall.

MR. JONES: Well, I don't—

[258] MR. WALSH: (interrupting): I don't care. We had a settlement talk yesterday. I don't think we ought to go into that.

MR. JONES: I'd be willing to strike that. It's part of the settlement discussion.

TRIAL EXAMINER: As a settlement discussion, it should be a part of the record. I'm not going to order it physically [259] stricken.

A. (Continuing) We talked there for awhile and I finally told Mr. Moore that I had to go to the doctor and he said, "Bob, you'd just as well sign this contract because you're going to have to sooner or later." He said, "As a matter of fact, I want an answer from you by 6 o'clock this eve-

ning," and I said, "Jack, I don't know if I can get around or even get ahold of you by 6:00 to let you know what the decision will be. I'll try to call you in the morning."

Q. Then, there has been testimony about a meeting that was held about the time that I was at your office on the afternoon of March 19th when your employees were also there. Would you just tell the Trial Examiner what also occurred there as best that you recall?

A. Yes. I asked you to come there that evening because I did not know what to tell these fellows and I did not know what to say to them and if they had signed up with the union, I did not know. I did not think they had. Really, the only discussion at that meeting that night, to the best of my knowledge, was you told the men—you talked about this initiation fee into the Sheet Metal Workers. You looked over the 1967 income tax returns, which I had, and you told me and them that I did not come under the jurisdiction of the National Labor Relations Board.

I had their checks made out for them if they had chosen to go to some other job. I wasn't going to try to keep them from [260] getting better jobs. I had nothing against any of them personally and I wanted to see them better themselves, and I still do. Bill Cockrum kept hollering, "Are we fired? Are we fired?" You know how he did that. I said, "No, you are not fired. You can work for me as long as I have work for you." I told the rest of them the same thing.

Q. What was the last thing you told those men on that evening?

A. That they could come back any time that they wanted to, that they were not fired and they were not laid off. They could come back any time they wanted to as long as I had work for them.

Q. All right. Now, then, the next morning. Did these men come back to work?

A. They came back to work the next morning.

Q. How did it happen that William Cockrum, Smith and Wilson did not continue working the next day?

A. They came to me and told me they had chosen the union to represent them. I can't keep this off the record but I don't guess that it makes a lot of difference, I told them, "Boys, you can't. I couldn't when I worked for the union. I never did work for a non-union shop. You're jeopardizing yourself. You are going to get yourself in

trouble with the union. You can work here if you want to, but if you have a better offer, I'm not going to hold [261] it against any of you for taking it." Those are the words I said.

Q. Then what happened?

A. They just left.

Q. Now, who is "they"?

A. Wesley Smith, Bud Wilson and Bill Cockrum.

Q. When you say "Wesley Smith," is that the same man as George Smith?

A. Right.

Q. When you say "Bud Wilson," is that the same man as Albert Wilson?

A. Right.

Q. After that time, who did you have working for you? Who after these three men left?

A. Well, the day they left I hired Clyde Hunt and then Statton.

TRIAL EXAMINER: For the sake of the record, is Jim Statton the same one that has been referred to as Jim Statton?

Q. (By Mr. Jones) Now, is Clyde Hunt or Jim Statton, are either one of them a journeyman?

A. Clyde Hunt is a journeyman. Jim Statton is a helper. If I am not pronouncing that correctly—

TRIAL EXAMINER (interrupting): I don't know. I just wanted to know.

[262] Q. (By Mr. Jones) Now, had either Jim Statton or Clyde Hunt worked for you prior to March?

A. Yes.

Q. On what type work and how often and when? Clyde Hunt?

A. I believe about seven months prior to March 20th.

Q. Do you mean it was seven month prior to March 20th when he had last worked for you?

A. That would be about correct, too. He only worked for a seven-month period.

Q. What had he been doing in between that time, do you know?

A. To the best of my knowledge, I believe he worked out at Sechler's and he was driving a taxi cab at the time I hired him.

Q. Sechler's, that you referred to, is another electrical contractor here whose employees belong to 453 IBEW?

A. Correct.

Q. Had Jim Statton worked for you before?

A. No, he hadn't. I believe also Jim Statton worked for the Sechler's Electric Company prior to working for me, but he was unemployed when I hired him. May I modify that statement a little bit? I made the statement that Jim Statton, I believe, was unemployed. There is a possibility—and I do not know. I am not sure—that he was working for Ship's Electric when I went out to talk to his wife.

[263] Q. All right. Now, you've heard testimony of some of the men about William Cockrum and George Smith. Of course, I'm getting out of order here. You sent out the letter dated March 22nd, Respondent's Exhibit 2, will you just tell us what it constitutes?

A. Well, this is a letter that I had you to mail to these employees.

Q. All right. This was done after it became known to you that they were claiming a discharge?

A. Right.

Q. Then, after this letter was mailed out on March 22, 1968, did those three gentlemen to whom it was addressed return to work?

A. They did.

Q. Do you know what day it was that they returned to work, whether it was on a Monday or Tuesday?

A. It was on a Tuesday.

Q. Then, those three gentlemen continued working until what date—well, let me phrase it this way. Is it a fact that William Cockrum and George Smith, again, ceased their employment with you as of March 27, 1968?

A. This is correct. We got pretty well caught up and I told them that I could use one journeymen and, to me, it didn't make any difference which one of them it was. I like them all and I want to see them all working, but we were caught up. I asked them what [264] they wanted to do about it and two of them, Wesley or Bud, suggested they draw straws. I don't know which one it was. I said I want to tell Bill Cockrum at home that we're going to draw straws. He went home early because I think his little boy had hurt himself. He went home early. I said, "This puts me in a bad light because I'm trying to be fair with all of

you. For me to draw straws, it doesn't seem like a fair deal but it's up to you." So, I believe, Wesley called Bill and told him what they had decided and Wesley asked me if I would draw for him and that still put me in a bad light for them because I let them draw. Bud and Wesley drew first and I was standing there holding the short one.

Q. All right. At any rate, what was the reason that two of those men had to be laid off at that time?

A. Because we had been working at the apartment house on South Florence which is a fairly sizeable job and we were asked to pull off that job by Lee Goings, the owner, on account of a picket which had been on the job for a couple of weeks and we were holding up his work. He asked us to pull off so he could get the other crafts on the job. By cutting off the biggest job we had and 60 per cent of our work, it left us short of work.

Q. All right. Now, how is it that you did not need to lay [265] off the other men you had at that time?

A. Well, these boys had jobs going and I wanted them to finish their own jobs, which has always been anyone's practice.

Q. Jim Statton and Boyd Perryman and Don Cockrum were all helpers, is that right?

A. This is correct.

Q. Now, after March 27th, was George Smith re-employed or called back to work?

A. Right.

Q. When was that, do you recall?

A. I don't recall.

Q. Do you recall whether or not George Wesley Smith came back to work the next week?

A. I believe he did.

MR. WALSH: Your Honor, it occurred to me that maybe we should work out a stipulation on these dates, layoffs and recall, because they are confusing and it might help us.

MR. JONES: We can stipulate that Wesley Smith came back to work April 1st because I checked that. Is it stipulated that George Wesley Smith came back to work on April 1st?

MR. WALSH: Yes.

TRIAL EXAMINER: All right, stipulation received.

[266] Q. (By Mr. Jones) Now, why is it that Wesley

Smith came back to work April 1st and I assume that Bill Cockrum did not?

A. Wesley Smith had a couple of houses roughed in that he knew about. A couple of jobs that he had done and he came back and finished those houses up.

Q. Now, what houses are you speaking of?

A. He had a house for Corbett and one for John Wilson and, I believe, you will find he had one for Potter.

Q. Now, since you rehired Wesley Smith at that time, had your work gotten in a position where you were able to rehire—let me just state it this way. General Counsel has just handed me a document that shows, and I'll ask you if this is right according to your records, that Albert Wilson—otherwise known as Bud Wilson—worked March 26th, 27th, 28th and 29th and he was sick on Monday, April 1st, and returned Tuesday, April 2nd, and that he worked continuously until he was laid off on April 18th. Do you recall whether that's true?

A. I would say that's a fairly correct statement.

Q. Was Albert Wilson further recalled on May 4th to work until around May 10th and he has not been back to work since, do you recall whether or not that's about true?

A. I would say that's fairly correct. The last day that he worked for me. The next day, I never did hear from him any more.

[267] Q. When was that, on May 10th?

A. I would say that's correct. He didn't call in or anything that I know of.

Q. Was he laid off on May 10th?

A. No, he wasn't.

Q. Are you saying that he just failed to report to work?

A. That's correct.

Q. Has he stated any reason for failing to report to work?

A. No.

Q. Now, is it true that Bill Cockrum has not worked since the time the straws were drawn on March 27th?

A. I would say that he hasn't worked for me.

Q. That's what I mean. Has your work gotten in such a position that you feel like you can use him at this time?

A. At this time, I don't need anyone. Excuse that kind of an answer, but we don't have much work.

Q. On April 14th or prior to that time, all of these men

referred to were working—on April 18th prior to that time—before the lay off on that date?

MR. WALSH: I object to the form of the question.

THE WITNESS: I don't understand what he means.

Q. (By Mr. Jones) Say, on April 17th, you had what men?

A. Before April 17th? How far before then?

Q. Just immediately prior to April 18th, who did you have employed?

A. There was Boyd, Wesley, Claude, Don—

[268] MR. WALSH (interrupting): Would you slow down just a little, please? I can't follow you.

Q. (By Mr. Jones) Let me ask it this way—

TRIAL EXAMINER (interrupting): Can we have an agreement?

MR. WALSH: I think we can.

MR. JONES: I think it can be agreed that Wilson—

MR. WALSH (interrupting): Wilson, Smith, Don Cockrum, Claude Sanders, Boyd Perryman, Hunt, Statton—was there anybody else? Was there some guy named Richard?

THE WITNESS: Claybough. He has worked for me off and on for some time, yes.

Q. (By Mr. Jones) Was he working for you on April 17th or 18th?

A. No, he wasn't.

Q. All right. But in addition to the people—

MR. WALSH (interrupting): Was Albert Hunt working on April 18th?

THE WITNESS: No, sir, he wasn't.

Q. (By Mr. Jones) On April 18th, you had working Albert Wilson, Claude Sanders, George Wesley Smith, Don Cockrum, Boyd Perryman, Clyde Hunt and Jim Statton, is that correct?

A. I believe this is correct.

[269] Q. Now, on that date, were all of those men laid off on April 18th?

A. I kept two helpers, Boyd Perryman and Don Cockrum.

Q. Well, did you keep them or were they laid off on that date? The reason I asked that question is from a checkbook, I see that nobody had 40 hours that week.

MR. FRANCKA: Now, I'm going to object to this as leading.

TRIAL EXAMINER: It seems to be testimony from counsel.

MR. JONES: I'm trying to refresh his memory on this. I did copy this from his checkbook.

TRIAL EXAMINER: If you want to propose it as a stipulation, maybe you can do it that way.

THE WITNESS: I don't want to swear about any of it, regardless.

TRIAL EXAMINER: I'm just suggesting to counsel that if he has some record that shows something, maybe counsel can agree to it.

Q. (By Mr. Jones) Will you just tell us how you remember it and who was laid off on April 18th of 1968?

A. The only ones, to the best of my knowledge, that were laid off on April 18th were Don Cockrum, Bill Cockrum, Wesley Smith and Albert Wilson.

Q. What about Claude Sanders?

A. Claude Sanders, to the best of my knowledge, worked that day.

[270] Q. Was he laid off after that date?

A. Yes, he was.

Q. All right. What was the reason for that layoff for all those men that you just mentioned?

A. Just lack of work.

Q. Did you have any knowledge as to whether any of these men had ever talked to a Labor Board investigator?

A. No, I didn't. Are you talking about today or at that time?

Q. No, at that time. Of course, we know that you've learned that subsequently in this case, but at that time is what I am referring to.

A. No.

Q. Did you lay off those men on April 18th of 1968 because they had talked to a Labor Board investigator?

A. No, I did not.

Q. Have you failed to re-employ any of those men because you thought they talked to a Labor Board man?

A. I have not.

Q. When was the first time that you had learned they had talked to a Labor Board man?

A. When Wesley Smith told me about it.

Q. When was that?

A. I would say on April 20th.

[271] Q. Did he tell you who had talked to the Labor Board man?

A. He did not tell me anything. I told him that I didn't want to know anything about it.

Q. Did he mention the names of those who had talked to the Labor Board man?

A. Yes, he did.

Q. He did at that time?

A. That's correct.

Q. Was that after you had already made the layoffs?

A. This is right.

Q. Now, you have heard the testimony about an alleged conversation between you and some of the employees at the apartment house job on March 19th on South Florence Street. Now, could you tell the Trial Examiner what, if anything, took place at that time or what was said between the employees at that time?

A. Yes. I went out to the apartment house on this date and, really, about all that I talked to them about was the job. I didn't discuss the union activity with them. There was something that came up about the job. There was something in one of their testimonies about Aton Luce Electric Company that was supposed to have come up that morning. To the best of my knowledge, there was nothing said about Aton out there.

Q. Did you, at that time or at any subsequent time, [272] threaten the employees with loss of employment?

A. I have never threatened any employee with loss of employment on account of his union activity.

Q. Did you ever telephone any of the employees and tell them that they would be blackballed or black-listed?

A. I never called any employee and told him that he would be black-balled.

CROSS-EXAMINATION

Q. (By Mr. Walsh) When you had the meeting with Jack Moore at the union hall, Ray Edwards was there, wasn't he?

A. Yes.

Q. He was in part of the conversation, wasn't he?

A. Actually, not on the union activity. He was a party of the fishing at the lake and so on and I recall him saying nothing about union activities.

Q. He was present, wasn't he?

A. Yes, he was.

Q. How long did you talk about fishing and unrelated [273] matters?

A. Oh, fairly close to an hour.

Q. How long did you talk about the union matters?

A. Probably 30 or 35 minutes.

Q. Now, tell us what Jack Moore did with the authorization cards.

A. You are referring to those authorization cards, those little cards that I looked at?

Q. I'll give them to you just so that there will be no misunderstanding. General Counsel's Exhibits 3-A through 3-E, those were the ones he showed you, weren't they?

A. To the best of my knowledge, these are the ones he showed me. He took them out of his desk drawer and he put them back in his top left-hand drawer.

Q. What did he do with them? Did he hand them physically to you?

A. He threw them out on the desk and said, "There are all your men. They have signed up."

Q. Did you look at them?

A. I picked them up and glanced at them, yes, sir.

Q. And you say you did not think those were your men's signatures?

A. No, sir, I didn't.

Q. Did you think Jack Moore had forged the signatures on them or what?

A. I was not accusing anybody, I just did [274] not think they had signed up. I thought if they had, they would have come to me and said something before they would. I thought they would have said something.

Q. You have known Jack Moore a long time, haven't you?

A. Yes, sir, I have.

Q. Do you think that Jack Moore would give you cards with phony signatures on them?

MR. JONES: Objection. That's improper.

TRIAL EXAMINER: It tends to be argumentative.

MR. WALSH: I think it goes to his state of mind on his doubt. He's testified that he's a good friend, that he's known him for years.

THE WITNESS: Yes, sir. I doubted that those were their signatures.

[276] MR. JONES: Under the Board law, as I understand it,

if an employer is presented with cards and if he has doubt about them being genuine cards or about the men signing up, that the next step for the union to take is to ask for an election.

TRIAL EXAMINER: I have to disagree with you, counsel, because you are here defending an 8(a)(5) charge and defending on the basis that there was a good faith doubt. Now, I think materially it is incumbent upon you to show what the good faith doubt is based upon and I think this is the area that counsel is getting into.

MR. WALSH: Could we excused the witness if we are going to discuss this?

MR. FRANCKA: I think this kind of discussion should be out of the hearing of the witness, Your Honor.

MR. WALSH: If we are going to discuss it at length, could we have him excused?

TRIAL EXAMINER: Well, I agree on this point with you but I have just indicated and I am about to overrule. Do you want to argue it further? If so, we'll excuse the witness.

MR. JONES: No, I'll not argue it further. I do want my objection to be on the record.

[277] **TRIAL EXAMINER:** The objection is on there and it's overruled.

Q. (By Mr. Walsh) I think there was a question pending, but I'll rephrase it for the third time. Did you have any idea or notion of your own where these might have come from?

A. No, sir, I don't know where they might have come from. But I'll tell you, in my own personal opinion, those two are the same handwriting and these two are the same handwriting. I noticed that up in Jack Moore's office.

Q. Have you any handwriting experience?

A. No, sir, I have not.

Q. Didn't you know your employees' signatures from them having worked for you?

A. Fairly well, I thought I did.

Q. Then you just took the cards and kind of ripped through them?

A. Yes, I did. Then I held the two of them up in my hand and compared those signatures.

Q. What did you tell Jack Moore? Did you tell him that you thought the cards were phonies?

A. No, I did not.

Q. What did you say?

A. I did not say anything about the cards, to the best of my knowledge.

Q. You did not say anything about the cards?

A. If [278] you are referring to the same statement about the cards, I'm going to tell you the same statement that Jack Moore gave me, that, "You've got five guys signed up here on these cards and it looks like you've got five new employees. If you want me to, I'll send them to you at noon." That's the statement he made to me.

Q. I'm sorry. I did not follow that. Let's just try to take it a little bit at a time and you are free to answer, but try to answer my question.

A. I try to answer correctly, too.

Q. All I'm asking you is when Jack gave you the cards, when you looked at them and compared the signatures and then gave him back the cards, did you say anything to him then about these cards being apparently phony?

A. No, sir.

Q. Now, this agreement which is Respondent's Exhibit 4 for identification, do you know what we are talking about?

A. Yes.

Q. How did that come into your possession?

A. To the best of my knowledge, Mr. Moore asked Mr. Edwards to get me a contract.

Q. Was this the contract that Jack Moore told you he wanted you to sign or was this a sample?

A. This was the contract that he got me to sign, so far as I know.

[279] Q. What did he say.

A. It was the only thing he ever gave me.

Q. Did you just ask him, "Could I see a sample contract"?

A. No, I asked them if they had a contract that I could take to my attorney and have read.

Q. So, Edwards went and got you this and it was your understanding that if you signed an agreement, it would be this?

A. Yes.

Q. How long—were you ever a member of the IBEW?

A. Yes, sir.

Q. How long approximately?

A. 20 years. 18 or 20 years.

Q. Did you work out of Local 453?

A. Yes, sir.

Q. How much of that time?

A. Probably 15 or 16 years.

Q. Now, aren't you aware that employees or members or persons who have designated Local 453 to represent them, persons like that, isn't it true that they can work for a contractor who is not under contract with the permission of the business manager?

A. I am not aware of the laws in that respect.

Q. You never knew that?

A. No, sir.

[280] Q. Now, I want to talk about Clyde Hunt and his work history. Did you testify that Hunt last worked for you about seven months before March of '68?

A. I didn't use any time.

Q. Well, let me ask you to trace, as best you can, Hunt's work history prior to March of '68.

THE WITNESS: May I ask something here of my own? When did we do that booking on him, Don?

MR. WALSH: We'd better ask the Examiner what he wants to do about this.

THE WITNESS: I don't know.

Q. (By Mr. Walsh) Maybe I can ask you some other questions that might help you. Is your memory hazy on this?

A. Yes.

Q. Isn't it a fact that Clyde Hunt never worked for you prior to March of '68 during the entire period of time that Wesley Smith was there?

A. I don't recall. I really don't.

Q. You can't answer that?

A. No. It seems like in my mind that Clyde was there when Wesley came to work there.

Q. Did he leave there then when Wesley came to work?

A. Shortly thereafter. I believe that's the way it was.

Q. Did he work there any more until recently?

A. No, that's right.

[281] Q. Isn't it a fact that during the—strike that. Isn't it a fact that on wiring jobs, either residential or commercial jobs or what have you, isn't it a fact that a helper isn't allowed to work on that job without a journeyman being with him?

A. This is only true to a point.

Q. Would you explain?

A. Yes. I don't have any first-year helpers. A second-year helper, by our city standards, is allowed to do certain things. A third-year helper is allowed to do certain things. A four-year helper is allowed to do certain things. Does that answer your questions?

Q. As they go up in experience—

A. (interrupting) They can start doing little jobs by themselves without the direct supervision of a journeyman.

Q. All right. Now, how much work can the highest grade helper do by himself? Give us a little bit of an idea.

A. The highest grade can probably—I'm not talking from a union standpoint.

Q. No, I mean just the city ordinance.

A. I think the highest grade helper, that would be fourth year, I think he could wire a house.

Q. By himself?

A. Yes, sir.

Q. Without the presence of a journeyman, is that correct?

A. I think this is correct.

Q. How about a third year? What are his limitations?

A. I'm not too sure, that he can't go out and wire a house by himself.

Q. How about a second year?

A. He can't.

Q. He can't?

A. No, sir.

Q. Does he have to be supervised by a journeyman?

A. Yes, he's supposed to be under the supervision of a journeyman.

Q. And, of course, the same would be true of anyone under them.

MR. WALSH: That's all.

CROSS-EXAMINATION

[285] Q. (By Mr. Francka) Now, directing your attention to this evening and the meeting with Mr. Jones and the employees, I think you said you had the checks made out and you went in to [286] get them. Now, what was said immediately before or what did you say or do immediately before you went in to get the checks?

A. I don't believe I said anything.

Q. Did you tell the employees that you were going in to get their checks?

A. I told them I would if they wanted them.

Q. Well, recite as best as you can recall what you did tell them about getting the checks.

MR. JONES: I object to the form of the question.

TRIAL EXAMINER: What's the basis?

MR. JONES: He stated that he didn't believe he told them anything and now he's asking "exactly what did you tell them."

TRIAL EXAMINER: The witness said something to the effect that he told them he was going in for the checks and that was in a previous answer. Now, counsel is asking if that was all that was said.

THE WITNESS: To the best of my knowledge, that was all that was said.

Q. (By Mr. Francka) Did you give them any explanation at all as to why they were getting their checks?

A. Yes, sir. If they wanted to better themselves, like I told in a previous statement, and work for the union, that was their privilege. I was for them. I did not want them getting themselves in trouble [287] by working for me, which I know in my mind is a violation, to work for a non-union shop. If they wanted to go where the union designated them to go to work, why, this is their privilege and I was for them.

Q. In other words, you were paying them off so that they either had—strike that.

A. No, sir, I did not hand them their checks.

Q. You gave them the alternative of going to work for a union shop or to work for you, is that right?

A. Yes, I told the men they could work for me as long as I had work for them and as long as they wanted to work there.

Q. But if they were going to work for the union, they had to go to a union place, is that right?

A. No, sir, they could work for me just as long as they wanted to.

Q. Well, what was the purpose in handling them the checks, Mr. Scrivener?

A. There wasn't any purpose, so far as I was concerned, there wasn't any purpose. They had the chance to better

themselves and far be it from me to stand in the way of anybody who can help themselves.

Q. Well, what was your thought processes? How did you arrive at this decision, then, to give them these checks?

MR. JONES: I object to that. It's argumentative.

[288] TRIAL EXAMINER: It's not argumentative.

THE WITNESS: I don't believe I understood his question anyway?

Q. (By Mr. Francka) What time during the day or afternoon or evening did you decide that you were going to give them these checks?

A. I think my mind was made up when I came into the shop that evening. Does that answer your question?

Q. What time was that?

A. Probably 15 or 20 minutes after 4:00.

Q. All right. Now, was this before or after the employees had arrived?

A. No, most of them were there.

Q. Then, did you go in and make up the checks at that time?

A. I had my wife to, yes, sir.

Q. You told her to make them up at that time?

A. Yes, sir.

Q. All right. Now, you said that you had your mind made up at that time when you came in about 4:15, is that right?

A. When I talked to the boys—I actually didn't talk to them. I heard them talking among themselves. I did not want anything to stand in the way of their getting better jobs. This was what I was giving them the opportunity to do if they selected to do this.

[289] Q. Well, how was this going to make this easier for them? How was this going to affect their decision as to whether they wanted to go to another job or not?

MR. JONES: Objection. He is phrasing the witness's testimony. This is leading.

TRIAL EXAMINER: Well, overruled.

A. You are asking me something that I can't answer. I don't know.

Q. (By Mr. Francka) Now, on that particular day, did you make out a check for Boyd Perryman also?

A. Yes.

Q. Clyde Hunt?

A. Yes.

Q. Jim Statton?

A. Yes, I believe this is correct.

Q. Now, this is the first day, however, that Hunt and Statton had worked, is that right? Weren't they hired?

A. Yes, they came to work that morning, I believe.

Q. They were hired on the 20th, the next day, weren't they?

A. No, I'm not sure about the date—you're correct, they were hired the following day.

Q. So, you did not make out checks for them?

A. Just for Boyd Perryman and Jim Statton—Boyd Perryman, excuse me. Don Cockrum and Boyd Perryman.

[290] Q. So, you didn't make out checks for Hunt and Statton because they come to work the next morning, is that right?

A. That's correct.

Q. Is that your testimony?

A. Yes.

Q. They came to work on the morning of the 20th, is that right?

A. Is this March 20th?

Q. Yes, excuse me.

A. I believe this is correct.

Q. Now, when—I think you testified that Hunt had been driving a taxi at the time you hired him in this case?

A. This is correct.

Q. Where did you locate Hunt on this occasion to hire him? Did you call him or did you go out to see him or how was the contact made?

A. Well, I went to his home and his wife was there and she informed me that he was driving a taxi and she would have him call me when he came in.

Q. Now, when did you go to his home? At what time of the day was it?

A. I would say it was around 11 o'clock in the morning or something.

Q. The morning of the 19th or 20th? He was hired on the 20th, I believe. That was the day he started working.

[291] A. It would have had to have been the 20th.

Q. The 19th?

A. Oh, it would have been the 19th, I'm sure.

Q. So, around 11 o'clock that day you drove to his home to see if he could go to work, is that right?

A. Yes, sir.

Q. Now, when did you hire Jim Statton?

A. Sir, I believe it was the following day.

Q. O.K. Now, what kind of work was he doing at that time? Was he working? I don't recall.

A. I'm not in a position to say that he was even working. He had been working for this Ship's Electric part time.

Q. Well, did you know Jim Statton before?

A. No, sir.

Q. How did you locate him or get in contact with him?

A. I don't remember. I really don't remember.

Q. But at some time during the 20th, you said you made contact with him?

A. Sir, you asked about making contact. He called me prior to that. I believe it was a couple of weeks prior to that and wanted to know if I had anything for him and I told him at that time that I didn't have. Now, what was the last question?

Q. Well, on his particular occasion, then, do you recall how you re-established contact with him?

A. Yes, sir.

[292] I went out to his home also.

Q. Would this have been on the 19th or the 20th?

A. I believe this was on the 20th.

Q. You hired him at this time, I presume?

A. Yes.

Q. Now, I don't know whether the record is clear as to the date that this Richard Claybough—how do you pronounce that?

A. Claybough.

Q. When he was employed. Do you recall the exact date of that employment?

A. No, sir, I don't recall the approximate date of that employment. Richard worked for me off and on for quite a long period of time. He was sent to me by the city electrical inspector when he was going to school, this vocational tech school, for part-time employment.

Q. Well, is he still under part-time employment?

A. Yes, sir.

Q. Does he work part time every day or is this once or twice a week or how often does he work?

A. No, sir. Sometimes he only works a short couple of hours maybe every three weeks or something to this effect.

Q. Is he working now?

A. For me?

[293] Q. Yes.

A. He hash't this week. I don't believe he did last week—yes, he did. He worked for me some last week, yes, sir.

Q. You call him when you need some extra help, is that right?

A. No, it's the other way around. He usually calls me when he wants to work.

Q. And then you let him work?

A. If I have anything for him, yes, sir. I work him around my home and everything.

Q. Now, what about Albert Hunt? By the way, is that a relative of Clyde Hunt?

A. Yes, his son.

Q. When did he start working for you?

A. When school was out.

Q. When school was out?

A. Yes.

Q. Do you mean around the 1st of June?

A. Yes, sir.

Q. What's his classification?

A. Just a helper.

Q. Is he working regularly this summer or as regular as the others?

A. No, sir, he hasn't worked regular. But he has worked off and on periodically.

Q. Now, I think these are all the employees you have now, Perryman, the two Hunts, Claybough and this James [294] Statton, is that right?

A. Yes, and Wesley Smith.

Q. Now, of these people, Clyde Hunt, I think you said, was a journeyman electrician?

A. Yes, sir.

Q. Now, the others, they are all helpers?

A. Wesley Smith is a journeyman electrician.

Q. I'm sorry. Yes. O.K. But the other three are helpers, is that right?

A. Jim Statton has worked. He has worked out of a local

as a journeyman electrician. I don't know what his status is, actually.

Q. But you counted him as a helper, is that right?

A. This is correct, yes. He is a fourth-year helper.

Q. Now, Mr. Scrivener, I want to direct your attention to this remark that was made about Aton Luce. You said that Aton Luce wasn't mentioned during that particular day, which was, of course, conflicting testimony that we have on this. Your testimony is, as I understand it, you have no recollection that Aton Luce was mentioned to your knowledge, is that right?

A. Just what time were you referring to?

Q. This March 19th, the one that was in discussion. It was in the apartment on South Florence.

A. Would you repeat that again?

[295] Q. I understood your testimony to say, to the best of your knowledge, Aton Luce was not mentioned on March 19th out at this South Florence apartment house.

A. I don't recall it, no, sir.

Q. The tone of your answer makes me think—was Aton Luce discussed on another occasion, is that what you're telling us?

A. It was in the testimony here yesterday that Aton Luce was discussed and I don't remember the date. No, sir, I don't.

Q. I'm asking you what you recall about a conversation about Aton Luce at any time. If it was on a different date, according to your recollection, let's have that date.

Q. As I recall, in the testimony yesterday—

A. (interrupting) I'm not asking that. I'm asking you about your recollection of any conversation at any time concerning Aton Luce.

A. They haven't come out on any of these jobs.

Q. Had you discussed it at any other time?

A. With anyone?

Q. Yes.

A. I can't honestly say. But I'm not going to deny it. It's possible. I have said something and in my heart I feel like I have said something about if we had to pull off [296] this South Florence Street job on account of the picket out there, it's possible that I could get Aton Luce to finish the job for us.

[297] Q. Do you have any other recollection of this conversation?

A. No, sir.

Q. Can you pinpoint it now since you have recited it, maybe in relation to place or time that this might have taken place?

A. No, sir, I couldn't.

Q. O.K. I want to direct your attention to the conversation you had with Wesley Smith in which you said he told you that this Board agent had talked to the men. Do you recall the testimony on that? I think you said Wesley Smith told you that the men had talked to the Board.

A. You are talking about in this written statement?

Q. No. I understood your testimony on direct examination to say that Wesley Smith had told you that the Board agent had talked to him and the men.

A. Yes, I recall saying that.

Q. Yes. Did Wesley Smith tell you—as I recall your testimony, Wesley Smith told you who was present at that meeting with the Board.

A. This is correct, of his own free will, too.

Q. Where did this conversation take place?

A. At the shop.

Q. At the shop? What time of the day?

A. To the best of my recollection, it was before 8 o'clock.

Q. Was he getting ready to go out on the job or something, is this it?

A. It was getting pretty close to 8 o'clock [298] because he came in and, in his own admission, he'll tell you he is never there at 10 minutes till 8, so it had to be close to 8.

Q. So it was just as he was going to work, is that right?

A. This is correct.

Q. Was anyone else present?

A. I don't recall, no, sir.

Q. Had all the other men left for their jobs?

A. No, sir, I don't believe they had gotten there yet.

Q. Was he filling his truck or had he already filled his truck that morning, or do you recall?

A. No, sir, I don't believe he had. I believe he had just come into the back of the shop and I was standing there.

Q. Had some of the other men arrived before you finished the conversation with him?

A. I didn't have any conversation with him, sir.

Q. Before the conversation was made to you?

A. I don't recall if there was.

Q. Do you recall where Wesley Smith worked that day after he went out on the job?

A. If I could recall the date I could probably recall the job.

Q. Do you recall the date that he told you about this?

A. I say if I could recall that date I could probably recall the job he went on.

[299] Q. You say if you could, then, do I understand that to mean at this stage you can't recall the date?

A. This is correct.

MR. FRANCKA: I have no more questions.

TRIAL EXAMINER: Anything further?

MR. WALSH: Nothing from me.

MR. JONES: Nothing further.

TRIAL EXAMINER: I have one or two questions.

Q. (By Trial Examiner) I understand that Smith was laid off from your testimony, around the 19th or 20th, is that right, of March? This was the first time he was no longer in your employ?

A. That's right.

Q. Then he came back somewhere around the 26th or 27th?

A. Yes, sir, that's correct.

Q. He was put back on doing what?

A. Well, he was finishing some jobs he had started before, some houses he had roughed in.

Q. Had those jobs been there ready for him to finish prior to that time?

A. They were not ready, sir.

Q. What was necessary?

A. For the sheetrockers to get in and get out. The sheetrockers had to be in, the job had to be roughed in and they weren't that far finished.

[300] Q. So the work was not ready in that interim until he got back to that point?

A. That's correct.

[301] Q. Let's go back to one other point. At the time you met with Mr. Moore on the 18th when you look at the

signatures, was it at that time you had doubts as to whether those signatures were genuine or not?

A. At the time he showed me the cards.

Q. Was your doubt at that time or at a later time?

A. No, sir, right then. When I picked them up, the first thing I noticed was that two that were signed looked so much alike. There were two others that I couldn't tell the difference. There was nothing more said about that at the time.

Q. Was anything said about it?

A. No, sir, I didn't say a word to him.

Q. Well, did you attempt to find out from the employees whether they had signed those cards or not?

A. No, sir, I didn't.

[302] Q. Is your question about the signatures your reason for doubting that the union had a majority?

A. Yes, that was the doubt in my mind.

Q. You based that just on the signatures themselves?

A. I would say I did, yes.

Q. Earlier you said something about feeling that the men would have told you.

A. I felt like I knew the fellows well enough that they would have, had they signed those cards.

Q. Were both of those things in your mind at the time?

A. Sir, when I looked at the cards, I didn't know who had signed them. I had no idea they had even been up there. I had no inkling they had even been up there.

Q. My question to you is in that time when you were sitting there, I'm asking you right now to recall as much as you can, what you were thinking about when you looked at those signatures and if you had a doubt as to whether the union had a majority or on what did you base it at that time?

A. No, sir, I had never given the majority a thought. I looked at those cards and I thought, well, I don't believe in my own heart they have signed those cards. I really didn't feel like they had. I could even tell you the position he handed me those cards in which made it stand out in my mind, and I just couldn't make myself [303] believe they had signed those cards. They were laid out Bill Cockrum and Donald Cockrum was immediately under it, Wesley Smith was immediately under that and there was Bud and Claude immediately below that. I could see that the same

pen had written it and I'm not too sure but what the same hand didn't write it. That was the thought in my mind.

Q. On the next day, how many employees were on your payroll besides those five?

A. I think there was one more.

Q. Is that Perryman?

A. Yes.

Q. I'll hand you General Counsel's Exhibit No. 2. This exhibit is dated March 20th. You received that when, if you recall?

A. I don't recall, sir.

Q. Looking at the bottom, this is a Xerox copy or some type of copy, it has a name on there. Is that your name?

A. Yes, sir, it is.

Q. There appears to be under the point date delivered 3-21-68.

A. That was it, yes.

Q. On that date who were the employees in your employ?

A. From that date, sir, I believe—what did you say it looked like it might be?

[304] Q. It looks like 3-21.

MR. WALSH: If there is any question about the legibility of these, I've got the original here. We will stipulate that the receipt was signed by Bob Scrivener and is signed 3-21-68.

A. Can I answer your question, sir?

Q. (By Trial Examiner) Go ahead.

A. To answer your question, I would say in my employment that day was Clyde Hunt, Boyd Perryman, Don Cockrum and Claude Sanders.

Q. Was Statton employed by you at that time?

A. I honestly can't say, sir, I honestly can't.

TRIAL EXAMINER: Any other questions?

MR. WALSH: No, I have none.

TRIAL EXAMINER: Mr. Jones?

MR. JONES: None.

TRIAL EXAMINER: All right. Thank you.

(Witness excused)

TRIAL EXAMINER: Mr. Jones?

MR. JONES: Your Honor, at this time, this is all. The Respondent will rest.

[305]

RAY EDWARDS

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated and give us your full name and address, please.

THE WITNESS: Ray Edwards, 408½ West Walnut, Springfield Missouri.

DIRECT EXAMINATION

Q. (By Mr. Walsh) You are assistant business manager for Local 453, Mr. Edwards?

A. Yes.

Q. I suppose your duties as a business manager are the usual ones of a union business manager, is that correct?

A. Well, I think so, yes.

[306] Q. I think we all know what those duties are. Did there come a time in March 1968 when you were present at a meeting between Mr. Jack Moore and Mr. Bob Scrivener at the union hall?

A. Yes, I was.

Q. Which time of the day was this meeting?

A. Oh, it was about 8:30 or 9 o'clock in the morning.

Q. What was the purpose of the meeting?

A. Jack had called Bob Scrivener the evening before and asked to meet with him on this particular day or as soon as he could. Bob had agreed to meet us about 8:30 that morning in our hall.

Q. Then what was the purpose of the meeting and what was discussed in general at this meeting?

A. Well, the discussion was in regard to employees working for Scrivener who had signed authorization cards. Jack and I the evening before—we were discussing with Bob the fact we would like to enter into bargaining with him, trying to work out a contract.

Q. Were you present during this entire conversation?

A. Yes, I was.

Q. At any time during this conversation, did you yourself or Mr. Moore say anything to Mr. Scrivener about the effects that his becoming union might have on his then present employees?

A. Well, not particularly what effect it might have on his employees. Mr. Scrivener looked at the cards, wanted to

see the [307] cards in regard to who had signed cards. He made the statement to Jack and I, asked us when we wanted his employees at the hall and he brought this up a couple or three different times. We informed him that we didn't want his employees at the hall, that we wanted them working for Scrivener. Our purpose was to try to bargain with him in regard to these employees as far as wages and working hours and things of this nature were concerned.

Q. Did either you or Jack Moore tell Mr. Scrivener that if he signed a union contract you would replace his employees with union men or with good men?

A. No, sir. He kept asking us when we wanted those employees up there and we told him we didn't want them up there. He asked us if he entered into a contract with us and needed additional employees, could we furnish them and we told him yes. Never at any time were we to replace any of his employees.

Q. One more question, was Mr. Scrivener given a sample contract during this meeting?

A. Yes, sir, he requested it.

MR. JONES: I object, it's of a leading nature.

TRIAL EXAMINER: I see what the objection is based on, but go ahead.

A. He requested a sample copy of the contract or one that he could take and study. We gave him one and he left with it.

Q. This exhibit marked Respondent's 4, that's it, isn't it?

[308] A. Yes, this is a sample copy of the current agreement.

Q. Before Mr. Scrivener left the office—strike that. About what time did he leave the office, do you recall?

A. Oh, I would say, approximately 10:30 in the morning.

Q. All right. Before he left, did Mr. Moore or yourself give him any kind of an ultimatum or deadline by when he had to sign this contract?

A. No.

Q. What was the understanding about your future contract with him or discussions with him?

A. When Mr. Scrivener asked for a copy of this contract, he wanted to take it and study it and he would get back with us at his earliest convenience. We would try to enter into negotiations. He had a trip he had to make to Kansas

City, I believe it was the next day. As soon as he had time to look this over, then he would get back in touch with us for future meetings. This is the way it was left.

MR. WALSH: This is all I have, Your Honor.

TRIAL EXAMINER: All right. Cross?

CROSS-EXAMINATION

Q. (By Mr. Jones) You stood right there in the door, didn't you, Ray Edwards, you stood right there when my client was in the door and Jack Moore told him he had to sign that contract by 6 o'clock that evening or he was going to file charges, didn't you?

A. No, sir, 6 o'clock that evening was [309] never discussed.

Q. Because you and Mr. Moore had decided before Mr. Scrivener got there, hadn't you, that you were going to make him sign that contract before he had a chance to talk to a lawyer?

A. No, sir.

Q. That's the way you and Mr. Moore handle the business, isn't it?

MR. FRANKA: If the court please, we are going to object to that. It is entirely inappropriate.

TRIAL EXAMINER: Just a minute, now. I don't know on what your question is based. The question does not sound proper to me.

Q. (By Mr. Jones) That is the only contract you asked Mr. Scrivener to sign during that meeting?

A. This is the only sample contract that was presented to him.

Q. Respondent's Exhibit 4?

A. Which he asked for a copy of and we gave it to him for he wanted to look it over.

Q. You didn't ask him to sign any other contract, did you?

A. No, sir.

MR. JONES: Why not offer Respondent's Exhibit No. 4 into evidence.

TRIAL EXAMINER: Any objections?

MR. WALSH: No objections.

[310] TRIAL EXAMINER: It is received.

(The document above referred to, heretofore

marked Respondent's Exhibit No. 4, was received in evidence.)

Q. (By Mr. Jones) You had a picket out at one of his apartment houses, didn't you?

A. Yes, we carried a picket.

Q. You were the one who put it on, weren't you?

A. I put it on.

Q. When did you put it on that job?

A. On approximately the 15th of March.

MR. FRANCKA: I am going to object to any testimony about this picket. It has been referred to admittedly. There is no issue or materiality as far as I can see in this case and it is beyond the scope of the rebuttal examination of this matter. I can see no purpose of prolonging this with a discussion of a picket line.

TRIAL EXAMINER: I don't know where counsel is going.

MR. JONES: Well, since the man who put the picket on there is on the stand and we have evidence about the picket, I just thought I would bring out that he was the man who put it on there.

TRIAL EXAMINER: I don't know how it helps me.

MR. JONES: There has been testimony about the picket.

TRIAL EXAMINER: And I think that testimony has been [311] brought forth by you.

MR. JONES: Well, that's right.

TRIAL EXAMINER: All right, so?

MR. JONES: So there has been testimony that the picket was causing interference with the work out there which made it necessary for us to alter our work force.

TRIAL EXAMINER: I'm not quite sure how the record stands on that point now.

MR. JONES: There is some on it.

TRIAL EXAMINER: There is something on it, but I don't know what the purpose of your proceeding along this line is. Why is it relevant to what is before us now?

MR. JONES: Because of that testimony about being necessary for us to alter our work force because of that.

TRIAL EXAMINER: I don't think there has been any contradiction that there was a picket line out there. What further testimony do we have to have about it?

MR. JONES: I think I am entitled to bring out all the facts on a point that came up without limiting myself to one—

TRIAL EXAMINER (interrupting): If you wanted additional testimony, certainly you could have brought it out during your case, but you chose not to. What I'm getting to right now is that at this stage after you have rested, what is the purpose of this?

MR. JONES: Well, the man is on the witness stand here and I believe—I would like to go into this. It has been brought [312] out in a law suit and I don't think the rules of cross-examination now are any different than they were before.

TRIAL EXAMINER: But we're not engaged in a law suit. Are you referring to a private litigation between them?

MR. JONES: No, I am referring to this proceedings, the hearing.

TRIAL EXAMINER: You confuse me on that point; therefore, I can admit latitude in cross-examination, but I don't know precisely where you are going. Do you want to excuse the witness and maybe you can tell me where you are going and we can find out?

MR. JONES: Actually, Your Honor, it's not going to take that long, just a few little questions and we will be through with it.

TRIAL EXAMINER: I still don't know where you are going and it doesn't appear to be relevant. If it is going to take you two or three questions, go ahead, counsel.

Q. (By Mr. Jones) I believe you stated you put the picket there on March 15th?

A. Yes, I did.

Q. At that time you didn't represent any employees, you hadn't signed up any cards on union employees of employees of the Respondent, had you?

A. No, sir.

Q. The picket did interfere with the work there. Some other employees ceased working there and shut down their jobs?

[313] **A.** I couldn't say, not to my knowledge.

Q. You don't have any knowledge of that?

A. No, sir.

Q. Didn't Lee Goings ever contact you about that?

MR. FRANCKA: Now, this is getting entirely too far afield, Your Honor.

TRIAL EXAMINER: I think you have gone beyond on a couple of questions.

MR. JONES: It is the work stoppage I am talking about.

MR. FRANCKA: But we're trying—

TRIAL EXAMINER (interrupting): Just a minute. You did not choose to go further into this work stoppage business other than the testimony you have offered prior. If that is part of your defense, then I think you are going pretty far beyond. Now, I don't see any purpose in this. It sounds as though you are getting in testimony that is reserved for another suit or should be proper on another action. I think you have reached the outer bounds of relevance is what I am saying.

MR. JONES: Can it be stipulated, then, that as far as this proceeding, not affecting anyone concerned, that the picketing was commenced on March 15th or possibly prior thereto, did cause a stoppage of work at the job which caused my client to have to alter his work.

MR. WALSH: No.

[314] **MR. JONES:** They won't stipulate to that so I'd like to bring it up with this witness.

MR. WALSH: This is the improper time to be doing this.

TRIAL EXAMINER: It is.

MR. WALSH: General Counsel or any person who has the burden of proof is very closely limited on rebuttal and I think that is as the ruling should be. I think what is good for the goose is good for the gander.

TRIAL EXAMINER: Latitude in cross-examination is something I will allow, but I think you have gone beyond it at this point.

MR. JONES: I didn't know that the rule of cross-examination was any different at this stage than it is in the beginning.

TRIAL EXAMINER: I have allowed ample latitude on cross-examination throughout. I think, as I have just indicated, you have reached the outer bounds of relevance and I don't think the testimony you are offering is proper at this time or at this point.

MR. JONES: I'll just make an offer of proof.

TRIAL EXAMINER: You cannot make an—I don't know that you can make an offer of proof with this witness. Have you talked with this witness? Have you questioned or gone over with him the subject matter on which you are about to offer?

Mr. Jones: I have a copy of a letter which he received on the date of March 22nd, he should have received it on March 22, 1968. Mr. Goings has told me of the fact that Mr. Edwards [315] did receive it. If Mr. Edwards denies it, I will get Mr. Goings here and impeach him on that point. I don't believe Mr. Edwards would deny it and I believe that if I were permitted to ask Mr. Edwards the question of whether the picket that he placed on that job caused a stoppage of work that he would answer it did cause a stoppage of work and that if I were to be permitted to ask him if Lee Goings didn't complain to him about this that he would admit that he did. If I asked him if he got a copy of this letter dated March 21, 1968, which he received March 22, 1968, from Mr. Goings complaining about the fact that picketing was occurring there at times when AA Electric was not even on the job, that he would admit that he got this letter. He would admit, I think if I asked him, that he talked to Lee Goings at some length over the telephone that afternoon before Mr. Goings finally wrote him this letter during which time Mr. Goings had told him on the phone that if he should remove the picket—because AA Electric Company did not have employees on the job that day or the previous day—that it was causing stoppage of work and Mr. Edwards still refused to move the picket and then this letter followed. I think Mr. Edwards would admit all this if I were to ask him these questions. I would offer to prove that at this time.

TRIAL EXAMINER: I think it is a collateral matter at this point. Your offer of proof is rejected.

[316] **Mr. Jones:** I believe that's all.

TRIAL EXAMINER: Anything further?

Mr. Walsh: No, sir.

TRIAL EXAMINER: All right, sir, you are excused.

JACK MOORE

was recalled as a witness by and on behalf of the General Counsel, having been previously sworn, was examined and testified further as follows:

[317] **DIRECT EXAMINATION**

Q. (By Mr. Walsh) Mr. Moore, I would like to ask you if there is a union policy with respect to the status em-

ployees who have just signed authorization cards with a non-union employer?

A. No, sir. What has always been the practice is, if we have guys sign authorization cards, till we have a contract with that employer, we leave him there to work.

Q. The employees continue working for him?

A. Yes, sir.

Q. When the men in this case who signed the authorization cards that had been put into evidence, when they signed these cards, what was their status, if any, in the union?

A. Their status was that they had chosen me as their bargaining representative and spokesman and so forth to work out a workable agreement, but as far as their status within the union itself and as a member at that point yet, they were not.

Q. When you had this discussion with Mr. Scrivener the day you showed him the cards, March 19, 1968, did you tell him at that time that you would replace his employees if he signed the union contract?

A. I never did.

Q. Did you make any statement to that effect?

A. No.

Q. The employees who have signed these cards, would they have continued to work for Mr. Scrivener?

A. They [318] would continue to work for Mr. Scrivener and we told Bob this. He told us that he was going to have them to us that day by noon. We told him that we would not permit this, that we did not want the men in the hall, we wanted them to continue to work for him.

Q. Toward the end of the discussion that day, did you give Mr. Scrivener a 6:00 p.m. deadline to sign the contract?

A. I had never heard of a 6:00 p.m. deadline until we came to this hearing.

Q. Did you give him any other kind of a deadline?

A. No, sir.

MR. WALSH: That's all.

TRIAL EXAMINER: Mr. Jones?

MR. WALSH: I'm sorry, I forgot a question.

Q. (By Mr. Walsh) Mr. Moore, do electrical contractors—strike that. Is there any union requirement that electrical contractors in the Springfield area or in your jurisdiction have to belong to NECA?

A. No, sir.

Q. What is the deal on that?

A. This is a choice of the employers whether they want to or do not want to belong to NECA.

Q. What is NECA?

A. NECA is known as the National Electrical Contractors Association. Their office is in Kansas [319] City. They have what they call the Springfield division of the Kansas City chapter. Now, they have business representative that handles their grievances, negotiations and so forth by the name of Paul Clark that has the service to this area down here, but it is strictly on a voluntary basis whether any of these employers do belong or don't belong. In fact, right now I would say that it is pretty close to a majority that don't belong in Springfield.

Q. All right. The majority of the employers you have contracts with?

A. Yes.

CROSS-EXAMINATION

Q. (By Mr. Jones) Who doesn't belong that you have?

A. Dameron Electric Company.

Q. How long has Dameron not belonged?

A. Dameron has not belonged to NECA for several years.

Q. What about the time that I was over at the meeting that I was representing Dameron Electric Company. They were out here on the Zenith project and they laid a man off and you called them out on strike. Wasn't that an NECA contract then?

A. I do not call men out on strike to commence with, and secondly, this is a contract just exactly like the one you have laying here. He had signed what we call a letter of assent to abide by this contract.

Q. So Dameron Electric Company is bound by the NECA contract?

A. He does not belong to NECA.

Q. But he is bound by their contract, isn't he?

MR. FRANCKA: Now, I don't see the materiality. If he agreed to be bound by this particular contract, I don't see its materiality here at all.

TRIAL EXAMINER: The question of NECA was raised by General Counsel as to whether everyone belongs to NECA, that's the area I thought he was in.

Q. (By Mr. Jones) So you say that Dameron Electric does not belong. I want to explain this.

MR. FRANCKA: There is a difference in belonging to NECA and signing a contract identical to the NECA contract.

MR. JONES: I want the witness to explain that where there is an attorney.

TRIAL EXAMINER: I think the witness just did. What else do you want?

MR. JONES: I just want to make sure I understand it.

Q. (By Mr. Jones) You say Dameron does not belong to NECA?

A. That's right.

Q. But it has signed an agreement like Respondent's Exhibit No. 4 here which makes them bound by the terms of the contract which NECA does have with the IBEW.

A. He signed what we call a letter of assent which states that by signing this letter he authorizes any person to bargain collectively for him and that he will live up to the terms and conditions of the agreement, but he does not belong to NECA as such.

[321] Q. To shorten it down, do you have any contractors here in Springfield who bargain with your union individually rather than letting NECA do the bargaining for them?

A. We have several we have bargained with individually.

Q. They have not signed the letter of assent for NECA to bargain with them?

A. They have all chosen to sign a letter of assent.

Q. Yes, all of them have, haven't they?

A. We have had several different—there are a lot of them who are not NECA contracts.

Q. I don't care whether you call them NECA contracts or not, do you have any contractors whose employees you represent and whom you have signed contracts with at any time directly or indirectly who have not signed a letter of assent for NECA to bargain for them with you?

A. We are furnishing some men to one who has not signed a letter of assent.

Q. Has he signed any kind of a contract?

A. He has not signed any kind of a contract?

Q. Can you answer my question directly?

A. I did answer you.

Q. Outside of that one who hasn't signed a contract with you, let me ask it once more.

[322] TRIAL EXAMINER: Are there any contractors outside of this one?

THE WITNESS: To my knowledge, he is the only one that we are furnishing men to that is not under signature to the agreement or letter of assent.

Q. (By Mr. Jones) All right. You did ask Bob Scrivener to sign this document represented as Respondent's Exhibit No. 4, did you not?

A. I gave it to—my assistant gave it to Bob Scrivener. He wanted to see a sample agreement and this is what we gave him.

Q. You asked him to sign this and agree to it?

A. I said that we wanted a contract with him and would be glad to sit down and work things out. As far as him signing this agreement, he couldn't have signed it, because there is no place to in this agreement.

MR. JONES: I believe that's all.

TRIAL EXAMINER: Anything further?

MR. WALSH: No, sir.

GENERAL COUNSEL'S EXHIBIT NO. 1-A

FD-301 (12-65)

Form Approved
Budget Bureau No. 64-1001.12

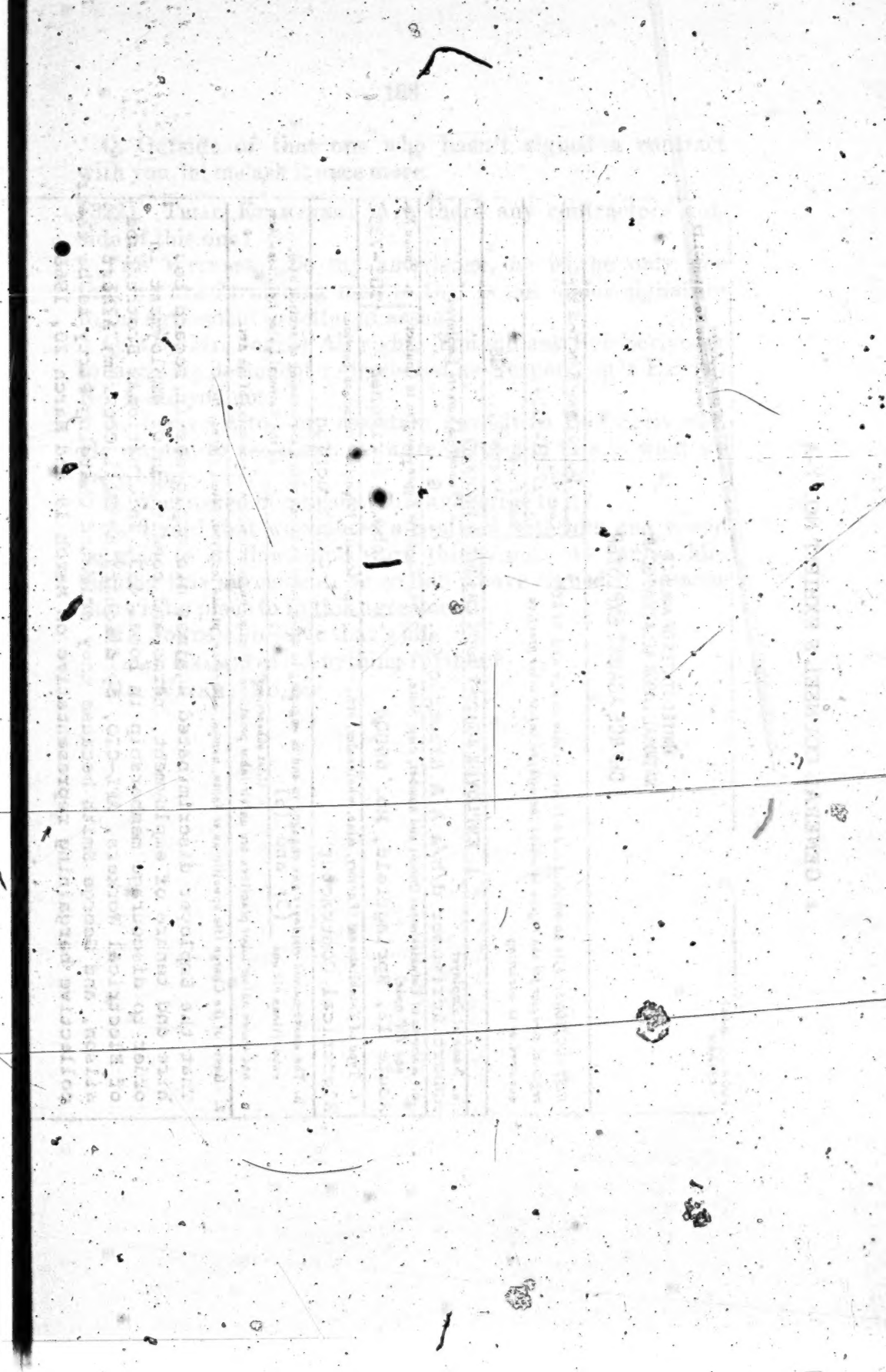
UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE	
Cause No. 17-CA-3519	
Date Filed March 21, 1968	
1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Robert Scrivener d/b/a A A Electric Co.	b. Number of Workers Employed 6
c. Address of Establishment (Street and number, city, State, and ZIP code) Route 12, Springfield, Mo. 65804	d. Employer Representative to-Contact Robert Scrivener TUL-7356
e. Type of Establishment (Factory, mine, wholesaler, etc.) Electrical Contractor	f. Identify Principal Product or Service Construction
g. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a) subsections (1) and (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.	
2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.) That the Employer discriminated against his employees in regard to hire and tenure of employment, terms and conditions of employment in order to discourage membership in Local 453, International Brotherhood of Electrical Workers, AFL-CIO, by discharging Bill Coburn, Albert Wilson, and George Smith because they selected Charging Party to be their collective bargaining representative on March 19 and March 20, 1968. That the Employer refused to bargain collectively with the representative of his employees as required by Section 8(a)(5) of the Act on or about March 19, 1968, and the period immediately preceeding.	
3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number) Local 453, International Brotherhood of Electrical Workers, AFL-CIO	
4a. Address (Street and number, city, State, and ZIP code) 408 1/2 Walnut Street, Springfield, Missouri 65806	4b. Telephone No. UN9-7251
5. Full Name of National or International Labor Organization of which it is an Affiliate or Constituent Unit. (To be filled in when charge is filed by a labor organization) International Brotherhood of Electrical Workers, AFL-CIO	
6. DECLARATION	
I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.	
By <u>Robert T. West</u> (Signature of representative or person filing charge) 408 1/2 Walnut Street	Business Manager (Title, if any)
Address <u>Springfield, Missouri 65806</u>	<u>417-UN9-7251</u> (Telephone number)
Date <u>3-20-68</u> (Date)	
WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)	

NATIONAL LABOR RELATIONS BOARD
Under 17-CA-3519

Is the matter of Robert Scrivener
settled by agreement
No. 17



GENERAL COUNSEL'S EXHIBIT NO. 1-B

NATIONAL LABOR RELATIONS BOARD

REGION 17

**610 Federal Building
601 East Twelfth Street
Kansas City, Missouri 64106**

March 21, 1968

REGISTERED—RETURN RECEIPT REQUESTED

ROBERT SCRIVENER D/B/A AA ELECTRIC Co.

Attn: ROBERT SCHRIVENER

Route 12

Springfield, Missouri 65804

Re: ROBERT SCRIVENER D/B/A

AA ELECTRIC Co.

Springfield, Missouri

Case No. 17-CA-3519

Gentlemen:

A charge has been filed with this office alleging that you have engaged in, and are engaging in, unfair labor practices within the meaning of the National Labor Relations Act, as amended. A copy of the charge is herewith served upon you. Also enclosed is a copy of Form NLRB 4541, pertaining to our investigative and voluntary adjustment procedures.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the Courts. In the event you choose to have a representative appear on your behalf, please have your representative complete "Notice of Appearance" Form NLRB-4701, enclosed herewith, and forward it promptly to this office.

You are requested to submit promptly a complete written account of the facts and a statement of your position in respect to the allegations made to the Board Agent indicated below.

Your cooperation with this office is invited so that all facts of the case may be considered.

Very truly yours,

/s/ ROBERT E. ALLEN
Regional Director

Enclosures

REA/cc

Case assigned to:
Tyrus L. Frerking

Agent's Telephone Number
FRanklin 4-5410

cc: Local 453, International Brotherhood of
Electrical Workers, AFL-CIO
Attn: JACK F. MOORE, *Business Manager*
408½ Walnut Street
Springfield, Missouri 65806

BENJAMIN J. FRANCKA, *Attorney*
714 Woodruff Building
Springfield, Missouri 65805

GENERAL COUNSEL'S EXHIBIT NO. 1-C

Form Approved 1 (12-68) Budget Bureau No. 64-R001.12		UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD CHARGE AGAINST EMPLOYER	
INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practices occurred or is occurring.		DO NOT WRITE IN THIS SPACE Case No. 17-CA-3519 Date Filed May 13, 1968	
1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT			
a. Name of Employer	b. Number of Workers Employed		
ROBERT SCRIVENER WMA AN Electric Co.	6		
c. Address of Establishment (Street and number, city, State, and ZIP code)	d. Employer Representative to Contact	e. Phone No.	
Route 12, Springfield, Mo. 65001	Robert Scrivener	701-7358	
f. Type of Establishment (Factory, mine, wholesaler, etc.)	g. Identify Principal Product or Service		
Electrical Contractor	Construction		
h. The above-named employee has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) (4) and (5) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.			
2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)			
<p>That the Employer discriminated against his employees in regard to hire and tenure of employment, terms and conditions of employment in order to discourage membership in Local 453, International Brotherhood of Electrical Workers, AFL-CIO, by discharging Bill Cockrum, Albert Wilson, and George Smith on March 19, 1968, because they selected Charging Party as their collective bargaining representative.</p> <p>That the Employer discriminated against his employees in regard to hire and tenure of employment, terms and conditions of employment in order to discourage membership in Local 453, International Brotherhood of Electrical Workers, AFL-CIO, by discharging Bill Cockrum, Albert Wilson, and George Smith on March 20, 1968, because they selected Charging Party as their collective bargaining representative.</p> <p>On or about April 18, 1968, the Employer terminated the employment of George Smith, Claude Saunders, Albert Wilson and Don Cockrum, because they gave testimony in the matter of Board Case No. 17-CA-3519, and because of their membership and activity in behalf of Charging Party and since said date has refused and now refuses to employ said employees.</p> <p>Since on or about March 19, 1968, the employer refuses and continues to refuse to employ said employees.</p>			
3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)			
Local 453, International Brotherhood of Electrical Workers, AFL-CIO			
4a. Address (Street and number, city, State, and ZIP code)		4b. Telephone No.	
4004 Walnut Street, Springfield, Missouri 65006		WM9-7251	
5. Full Name of National or International Labor Organization of which it is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)			
International Brotherhood of Electrical Workers, AFL-CIO			
6. DECLARATION			
I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.			
By <u>Ray Edwards</u> (Signature of representative or person filing charge)		<u>Burman Ryp</u> (Title, if any)	
Address <u>4004 Walnut Street</u> <u>Springfield, Missouri 65006</u>		<u>417-WM9-7251</u> (Telephone number)	
		(Date)	
WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)			

to refuse to bargain collectively with authorized agents of Charging Party, a labor organization chosen by a majority of employees of the employer in a unit appropriate for purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment as required by Section 8(a)(b) of the Act. That the employer has violated the rights of his employees to organize, to form, join and assist labor organizations to bargain collectively through representatives of their own choosing, to engage in concerted efforts for the purpose of collective bargaining for their mutual aid and protection; in that the employer has interfered with restrained, and coerced his employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act as Amended in violation of Section 8(a)(1) of the Act.

GENERAL COUNSEL'S EXHIBIT NO. 1-F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

ROBERT SCRIVENER, D/B/A AA ELECTRIC CO.

and

Case No. 17-CA-3519

LOCAL 453, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO

COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 453, International Brotherhood of Electrical Workers, AFL-CIO (herein called the Union) that Robert Scrivener, d/b/a AA Electric Co. (herein called the Respondent) has been engaging in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Section 151, *et seq.* (herein called the Act), the General Counsel of the National Labor Relations Board (herein called the Board) on behalf of the Board, by the Regional Director for the Seventeenth

Region, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended:

1.

(a) A charge herein was filed by the Union on March 21, 1968, and served by registered mail on the Respondent the same day.

(b) An amended charge was filed by the Union on May 13, 1968, and served by registered mail on the Respondent the same day.

2.

(a) At all times material herein, the Respondent, a sole proprietorship, has maintained a place of business at Springfield, as an electrical contractor, performing electrical work primarily on new residential construction.

(b) During the calendar year 1967, the Respondent's gross revenue was approximately \$69,000 and during the same period the Respondent purchased goods and materials within the State of Missouri valued in excess of \$30,000 of which in excess of \$15,000 was purchased from suppliers who in turn received them directly from sources outside the State of Missouri.

(c) The Respondent is now, and at all material times herein has been, an employer subject to the Board's statutory jurisdiction and is an employer engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act.

3.

The Union is now, and at all material times herein has been, a labor organization within the meaning of Section 2(5) of the Act.

4.

On or about the following dates in 1968, at the location indicated, Respondent Robert Scrivener did:

(a) Encourage employees to join a labor organization of Respondent's choosing—at a construction site on Pinehurst Circle in Springfield, Missouri, March 15.

(b) Poll, or cause to be polled, employees in order to ascertain their union sympathy—at the Respondent's facility, March 15.

(c) Interrogate employees concerning their union activity—at a construction site on South Florence Street in Springfield, Missouri, March 19; at the Respondent's facility, March 20.

(d) Interrogate employees concerning their meeting with and being interviewed by an agent of the Board—at the Respondent's facility, April 18.

(e) Threaten employees with loss of employment on account of their union activity—at a construction site on South Florence Street, Springfield, Missouri, March 19; in a vehicle traveling toward the Respondent's facility, March 19.

(f) Threaten employees with blackballing on account of their union activities—by telephone, March 20.

5.

(a) On or about March 19 and 20, 1968 the Respondent discharged employees William Cockrum, George Smith, and Albert Wilson on account of their activities on behalf of the Union.

(b) On or about March 27, 1968, the Respondent laid off employees William Cockrum and George Smith on account of their activities on behalf of the Union.

(c) On or about April 18, 1968, the Respondent laid off employees Donald Cockrum, Albert Wilson, George Smith, and Claude Sanders, because they met with and gave evidence to an agent of the Board in conducting an investigation of the charges filed herein.

(d) Since on or about March 27, 1968, the Respondent has failed and refused to reemploy William Cockrum in his former or substantially equivalent position.

(e) Since on or about April 18, 1968, the Respondent has failed and refused to reemploy employees Albert Wilson, George Smith, and Claude Sanders to their former or substantially equivalent positions.

6.

(a) All employees employed by the Respondent, excluding office clerical employees, guards and supervisors as

defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) On or about March 18, 1968, a majority of the employees of the Respondent in the unit described above in subparagraph 6(a) selected and designated the Union as their representative for the purposes of collective bargaining and at all times since said date the Union has been their exclusive representative for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

(c) Commencing on or about March 18, 1968, and continuing to date, the Union has requested, and is requesting, the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive representative of the Respondent's employees in the unit described in subparagraph 6(a).

(d) Commencing on or about March 18, 1968, and at all times thereafter, the Respondent did refuse, and continue to refuse, to recognize and bargain collectively with the Union as the exclusive collective bargaining representative of the employees in the unit described above in subparagraph 6(a).

7.

By the acts, and by each of them, described above in paragraphs 4, 5, and 6, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act and has thereby engaged in, and is thereby engaging in, unfair labor practices affecting commerce within the meaning of Sections 8(a), 2(6) and 2(7) of the Act.

8.

By the acts, and by each of them, described above in paragraph 5, for the reasons stated therein, the Respondent has discriminated, and is discriminating, in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization and has thereby engaged in, and is

thereby engaging in, unfair labor practices affecting commerce within the meaning of Sections 8(a)(3), 2(6) and 2(7) of the Act.

9.

By the acts, and by each of them, described above in subparagraphs 5(c) and 5(e), the Respondent has discharged or otherwise discriminated against its employees because they filed charges or gave testimony under the Act, and has thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Sections 8(a)(4), 2(6) and 2(7) of the Act.

By the acts, and by each of them, described above in subparagraph 6(d), under the circumstances set out above in paragraphs 4 and 5 and subparagraphs 6(a), (b), and (c), the Respondent has failed and refused, and is failing and refusing, to bargain collectively in good faith with the duly designated and selected representative of its employees and has thereby engaged in, and is thereby engaging in, unfair labor practices affecting commerce within the meaning of Sections 8(a)(5), 2(6) and 2(7) of the Act.

PLEASE TAKE NOTICE that on June 25, 1968, at 10:00 a.m. (CDT), at the

City Council Chambers
City Hall
Springfield, Missouri

a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person or otherwise, and give testimony. Form NLRB 4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases as Taken from the Board's Published Rules and Regulations and Statements of Procedure, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.20 and 102.21 of the Board's said Rules and Regulations, the Respondent shall file with the said Regional Director, an original and four (4) copies of an answer to

said complaint within ten (10) days from the service thereof, and that, unless the Respondent does so, all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

/s/ ROBERT E. ALLEN

Regional Director

National Labor Relations Board

Seventeenth Region

610 Federal Building

601 East 12th Street

Kansas City, Missouri 64106

Dated: May 17, 1968

(SEAL)

**SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS
HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD
IN UNFAIR LABOR PRACTICE CASES AS TAKEN FROM
THE BOARD'S PUBLISHED RULES AND REGULATIONS
AND STATEMENTS OF PROCEDURE**

The hearing will be conducted by a Trial Examiner of the National Labor Relations Board. He will preside at the hearing as an independent, impartial trier of the facts and the law and his decision in due time will be served on the parties. His headquarters are either in Washington, D.C. or San Francisco, California.

At the date, hour, and place for which the hearing is set, the Trial Examiner, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clear-cut; or he may, on his own initiative, conduct such a conference. He will preside at any such conference, but he may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record—for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the Trial Examiner conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any

party unwilling to participate in or to make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Trial Examiner for his approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Trial Examiner specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Trial Examiner and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Trial Examiner will allow an automatic exception to all adverse rulings, and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies shall also be supplied to other parties. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Trial Examiner, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Trial Examiner may himself ask for oral argument, if at the close of the hearing he believes that such argument would be beneficial to his

understanding of the contentions of the parties and the factual issues involved.

Any party shall also be entitled upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the Trial Examiner who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations with respect to the procedure to be followed *before* the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Trial Examiner will be considered unless received by the Chief Trial Examiner in Washington, D.C. (or, in cases under the San Francisco, California branch office of Trial Examiners, the Associate Chief Trial Examiner in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously upon all other parties, and proof of such service furnished to the Chief Trial Examiner or Associate Chief Trial Examiner, as the case may be. All briefs or proposed findings filed with the Trial Examiner must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service upon the other parties.

In due course the Trial Examiner will prepare and file with the Board his decision in this proceeding, and will cause a copy thereof to be served upon each of the parties. Upon filing of the said decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, upon all parties. At that point, the Trial Examiner's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Trial Examiner's Decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, Series 8, as amended; particularly in Section 102.46, and following sections. A summary of the more pertinent of these provisions will be served upon the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. Upon request, the Trial Examiner will afford reasonable opportunity during the hearing for discussions between the parties if adjustment appears possible, and may himself suggest it.

GENERAL COUNSEL'S EXHIBIT NO. 1-G

ANSWER BY RESPONDENT

Comes now the above named Respondent, Robert Scrivener, d/b/a AA Electric Co., and for his answer to the complaint and notice of hearing herein, states, denies, alleges, and avers as follows:

1.

Admits that a charge was filed herein on March 21, 1968, and that an amended charge was filed herein on May 13, 1968, and denies each and every other allegation of Paragraph 1 and the subparts thereof.

2.

Admits that Respondent is a sole proprietorship with its place of business in Springfield, Missouri, doing business as an electrical contractor primarily on new residential construction. Respondent hereby denies each and every other allegation of Paragraph 2 and the subparts thereof of the complaint.

3.

Admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

4.

Respondent hereby denies the allegations of Paragraph 4, 5, 6, 7, 8, 9, and 10, and specifically denies each and every allegation of the complaint not herein above expressly admitted.

5.

Respondent, further answering, alleges that he is not subject to the National Labor Relations Act as amended, nor to the jurisdiction of the Board, and that his business is less than \$50,000 per year in Interstate Commerce being below the established jurisdictional standards of the National Labor Relations Board. Respondent further asserts he has not intended to commit any unfair labor practices or to discriminate against any employee or to refuse to comply with any requirements of law which are applicable to him.

WHEREFORE, Respondent respectfully prays the National Labor Relations Board to dismiss the complaint herein in its entirety.

CHURCH, PREWITT, JONES, WILSON,
& KARCHMER

/s/ DONALD W. JONES

110 Landmark Building
Springfield, Missouri
Attorneys

[CERTIFICATE OF SERVICE]

GENERAL COUNSEL'S EXHIBIT NO. 1-H

MOTION TO MAKE MORE DEFINITE AND CERTAIN

Comes now the Respondent, Robert Scrivener, d/b/a AA Electric Co. and pursuant to the Federal rules of civil procedure, made applicable under Section 102.39 of the Board's rules and regulations. Series 8, moves the Regional Director to make the complaint and notice of hearing more definite and certain in the following respects, on the grounds that the allegations of the complaint referred to below are so vague and indefinite as to render it impossible for the Respondent to know that with which he is charged and to properly prepare a defense thereto:

1. Paragraph 2(b) of the complaint should be made more definite and certain so as to apprise the Respondent of the names of the "Suppliers" who are alleged to have sold supplies to Respondent and who in turn are alleged to have

received them directly from sources outside the state of Missouri, and that paragraph should be made more definite and certain to name the "sources" outside the state of Missouri referred to. Respondent is entitled to have these facts in order to make his defense. If the Board does not have these facts, then the complaint should be dismissed as not having been properly investigated to ascertain jurisdiction.

2. Paragraph 4(a) of the complaint should be made more definite and certain to set forth the name of the "employees" whom Respondent allegedly encouraged to join a labor organization, and to set forth the name of the "labor organization" referred to.

3. Paragraph 4(b) should be made more definite and certain to set forth the names of the "employees" referred to there.

4. Paragraph 4(c) should be made more definite and certain to set forth the names of the "employees" referred to there.

5. Paragraph 4(d) should be made more definite and certain to set forth the names of the "employees" referred to there, and the name of the "agent of the board" referred to there.

6. Paragraph 4(e) should be made more definite and certain to set forth the names of the "employees" referred to there.

7. Paragraph 4(f) should be made more definite and certain to set forth the names of the "employees" referred to there, and the word "blackballing" should be explained in sufficiently alleged facts to know with what we are charged.

MOTION TO DISMISS

COMES NOW the above named Respondent and hereby moves the National Labor Relations Board to dismiss the complaint in its entirety on the grounds that it does not set forth facts stating a claim for relief under the National Labor Relations Act in that it does not allege sufficient jurisdictional facts to show that Respondent is subject to the jurisdiction of the National Labor Relations Board or of the National Labor Relations Act itself in that

it does not set forth facts showing any violation of the law by the Respondent herein.

CHURCH, PREWITT, JONES, WILSON,
& KARCHMER

/s/ DONALD W. JONES

110 Landmark Building
Springfield, Missouri
Attorneys for Respondent

[CERTIFICATE OF SERVICE]

GENERAL COUNSEL'S EXHIBIT NO. 1-L

ORDER DENYING MOTIONS TO MAKE MORE DEFINITE AND CERTAIN AND TO DISMISS

On May 24, 1968, Counsel for Respondent, Robert Scrivener, d/b/a AA Electric Co., filed a Motion to Make More Definite and Certain and a Motion to Dismiss. On May 28, 1968, Counsel for General Counsel filed an Opposition thereto in which he supplied some but not all of the information requested.

Now, upon consideration of the matter.

IT IS HEREBY ORDERED that Respondent's Motions to Make More Definite and Certain and to Dismiss be denied.

A complaint is adequate which describes the nature of the activity, giving the dates and names of Respondent's agents. *Dal-Tex Co.*, 130 NLRB 1313. Respondent is not entitled to the names of employees who are the alleged victims of unfair labor practices within the meaning of Section 8(a)(1) of the Act. *Walsh-Lampkin Wholesale Drug Company*, 129 NLRB 294.

The Complaint, together with the additional information supplied, contains sufficient factual allegations to apprise the Respondent of the nature and extent of the alleged unfair labor practices. The Complaint conforms to the Board's Rules and Regulations Series 8, as amended, Section 102.15. Pleadings should not plead evidence. *Wm. H. Dixon*, 130 NLRB 1204. The motion is in effect one for

pretrial discovery, which is not authorized under the Act.
Globe Wireless, Ltd., 133 F.2d 748 (5th Cir. 1951).

/s/ CHARLES W. SCHNEIDER
 Trial Examiner

Dated: June 10, 1968

GENERAL COUNSEL'S EXHIBIT NO. 4

April 17, 1968

Please supply the undersigned a copy of the statement
 supplied the NLRB on this date.

/s/ DON COCKRUM

Not supplied as of 5/6/68
 TF

State of Missouri)
 County of Greene)

I, Donald Cockrum, make the following statement under
 oath.

I live at 714 N. Rogers, Springfield, Mo. I have no phone.
 I am 25 years of age and I am employed by Robert Scrivener
 as an apprentice electrician.

On March 18, 1968, I signed a Union authorization card
 for the IBEW. Both Ray Edwards and Jack Moore told
 the five employees present that by signing the card it au-
 thorized the Union to represent us.

After work on March 19, 1968, Scrivener asked me to
 ride with him to the shop from the job site. During the trip
 Scrivener said he would probably have to let everybody go
 because we had gotten him into a hell of a mess, that he was
 going to let my brother go for sure, since he was the ring-
 leader and said he would really be in a mess if he had
 earned a little more money. During the trip Scrivener was
 quite nervous and I said very little. He also said he had
 called James Mitchell Electric and told him if any of
 Scrivener's employees called for a job, Mitchell was to pay
 \$1.25 per hour, even if he could use them at all. He said
 he had called some other contractors and they wouldn't be

needing any help. He said the employees had made their bed and now they could sleep in it. As we neared the shop, Scrivener asked me what I thought he ought to do. I told him he could do whatever he wanted to do.

I have read this statement and I swear it is true and correct to the best of my knowledge and belief.

/s/ DON COCKRUM

Subscribed and sworn to before me this 17th day of April, 1968, at Springfield, Missouri.

/s/ TYRUS L. FREEKING
Field Examiner
N.L.R.B.

GENERAL COUNSEL'S EXHIBIT NO. 5

(State of Missouri)
(County of Greene)

I, Don Cockrum, make the following statement under oath.

This is the second statement I have furnished and Agent of the N.L.R.B. in the AA Electric case.

After work on April 18, 1968, Scrivener talked to Sanders, Smith, Wilson and myself at the shop. Scrivener said things were slack and he didn't have too much work. He said he had work for Perryman and Stayton and he would call Hunt if he needed him. Scrivener asked if we wanted our checks. We answered in the affirmative and we were given our checks. Hunt was not given a check.

About 11:00 a.m. on April 30, 1968, Scrivener came past my house and asked me if I would help him on a house. I told him I would. I worked yesterday afternoon but I wasn't told to return this morning.

I've worked for the company off and on for four years. During the time I've been with the company there hasn't been a layoff for lack of work, not even in wintertime.

As of April 18, 1968, there were at least three houses in the process of being wired. In past summers, we did all wiring of air conditioners for Tom Powell and Son (two of being wired). Apartment houses are in the process.

I have read this statement and I swear it is true and correct to the best of my knowledge and belief.

/s/ CHARLES COCKRUM

Subscribed and sworn to before me this 1st day of May 1968, at Springfield, Missouri.

/s/ TYRUS L. FREERKING

Field Examiner

N.L.R.B.

RESPONDENT'S EXHIBIT NO. 1

March 22, 1968

MR. ROBERT E. ALLEN, *Regional Director*
National Labor Relations Board
610 Federal Building
601 East Twelfth Street
Kansas City, Missouri 64106

Re: ROBERT SCRIVENER, D/B/A
AA ELECTRIC COMPANY
Case No. 17-CA-3519

Dear Sir:

This will acknowledge receipt of your letter dated March 21, 1968, which was sent to my above-named client. Although there was no copy of the unfair labor practice charge enclosed, my client had received a copy of such charge the previous date, apparently mailed by the Union itself; and we assume this is the same charge.

That charge accuses my above-named client with having illegally discharged Bill Cockrum, Albert Wilson, and George Smith and with having refused to bargain with the Union.

I have gone over the financial records of the company with my client and I am certain that his business does not meet the jurisdictional standards of the Board, as his total volume of business, without regard to whether it is intrastate or interstate, is less than \$50,000 in any one year, and he does not do any business outside of the state and purchases no materials directly outside the state, and his indirect purchases of materials would be \$15,000 per year or less. Therefore, we would respectfully ask that this charge be dismissed because my client is not subject to the jurisdictional standards of the National Labor Relations Board.

My client has not discharged any of these men, as he has told all of them that they are free to work whenever they desire to do so. I am attaching a copy of the letters sent by my client today to each of these men which clarifies this situation and which clearly expresses to each of them that

they are free to work and that there is no intent to discriminate against any of them.

In the event that you desire to check out the jurisdictional amount with my client, I would be glad to assist you at any time and I would request that you not contact my client except through me.

Very truly yours,

CHURCH, PREWITT, JONES, WILSON
& KARCHMER

Donald W. Jones

DWJ:s
Enc.

RESPONDENT'S EXHIBIT NO. 2

March 22, 1968

MR. BILL COCKRUM
1629 South Oak Grove
Springfield, Missouri

MR. ALBERT WILSON
Route 6, Box 622
Springfield, Missouri

MR. GEORGE SMITH
RFD 2
Republic, Missouri

Gentlemen:

This letter is written to clarify the fact that I have not discharged either one of you and you are all free and welcome to work for me as usual at any time, whether or not you are members of the I.B.E.W. Union or any other union.

I will be glad to have any or all of you work as usual, so long as I have work available which you can do, and I would be glad to have you report to work Monday morning as usual.

It was never my intention to discriminate against you in any way for any interest you may have in any union. However, I did feel it was my duty to tell you what had been told me by Mr. Jack Moore of the I.B.E.W. Union, when he demanded me to sign a contract with him, to the effect that if I signed such contract I would be required to hire all men through his hiring hall and that Mr. Moore would not permit you men to work for me, in all probability, as you would have to stand in line in the hiring hall procedure and I would have to hire the men who had first signed in the hiring hall who were without jobs.

Very truly yours,

Robert Scrivener

RESPONDENT'S EXHIBIT NO. 3

May 15, 1968

MR. ROBERT E. ALLEN
Regional Director
National Labor Relations Board
Region 17
610 Federal Building
601 East Twelfth Street
Kansas City, Missouri 64106

RE: ROBERT SCRIVENER, D/B/A A A ELECTRIC CO.
CASE No. 17-CA-3519

Attention: MR. JAMES G. WALSH, JR., *Board Agent*

Dear Sir:

We are in receipt of the amended charge in the above case against the employer whom I represent. On behalf of the employer, we hereby deny all of said charges as amended. We further assert that the Board does not have jurisdiction of this matter since the employer's activities fall below the jurisdictional standards of the Board, and I believe that you will agree that the investigation so far so conducted by the Board clearly shows this to be true.

Further, the charges should be dismissed as being completely ridiculous. The charge regarding the alleged termination of April 18, 1968, could not be true as it is alleged that the employees were terminated for giving testimony in Board Case No. 17-CA-3519; and there has never been any proceeding in such matter that I know about, and if any hearings were held without notifying me, I am sure that they would be illegal. I believe that an attorney representing a party should be advised of any hearings before they are held.

The employer denies all of the allegations as to discrimination and denies that he comes within the Board's jurisdictional standards.

I would appreciate your advising me as to your ruling on

our allegation of lack of jurisdiction, as this case has been pending for quite some time, and I think that we should be advised of your determination in this regard.

Very truly yours,

CHURCH, PREWITT, JONES, WILSON,
& KARCHMER

Donald W. Jones

DWJ:mjr

cc: MR. ROBERT SCRIVENER
A A Electric Company
Route 12
Springfield, Missouri 65804

RESPONDENT'S EXHIBIT NO. 4

AGREEMENT

This Agreement was entered into by and between the Springfield Division, Greater Kansas City Chapter, National Electrical Contractors Association, Inc., Springfield, Missouri, in behalf of its members who employ workmen under the terms and conditions contained herein and have signed a letter of Assent to be bound by this Agreement for its duration as set forth below, and Local Union No. 453 of the International Brotherhood of Electrical Workers. It shall also apply to other individual employers who employ workmen under the terms of this Agreement and by virtue of signing a similar Letter of Assent authorizes the Greater Kansas City Chapter, N.E.C.A., as their collective bargaining agent for all matters contained herein or affecting this Agreement including all amendments or revisions adopted pursuant thereto. The term "N.E.C.A." as used hereinafter shall mean the Springfield Division, Greater Kansas City Chapter, N.E.C.A. The term "Union" as used hereinafter shall mean Local Union No. 453, IBEW.

BASIC PRINCIPLES

The N.E.C.A. and the Union have a common and sympathetic interest in the Electrical Industry. Therefore, a working system and harmonious relations are necessary to improve the relationship between the N.E.C.A., the Union and the Public. Progress in industry demands a mutuality of confidence between the N.E.C.A. and the Union. All will benefit by continuous peace and by adjusting any differences by rational common-sense methods. Now, therefore, in consideration of mutual promises and agreements herein contained, the parties hereto agree as follows:

ARTICLE I

Effective Date—Termination Amendments—Disputes

Section 1. This Agreement shall take effect September

1, 1967, and shall remain in effect until August 31, 1969. It shall continue in effect from year to year thereafter from September 1 through August 31 of any year unless changed or terminated in the manner later provided herein.

Section 2. Either party desiring to terminate or to change this Agreement must notify the other in writing at least one hundred twenty (120) days prior to August 31 of any year. Whenever notice is given for desired changes, the nature of those changes desired must be specified in a written notice requesting same. Notice by either party of a desire to terminate this Agreement shall be handled in the same manner as a proposed change and reason for termination shall be given in the written notice.

Section 3. This Agreement shall be subject to amendment at any time by mutual consent of the parties hereto. Any such amendment agreed upon shall be reduced to writing, signed by the parties hereto and approved by the International Office of the Union and the National Office of N.E.C.A., the same as this Agreement.

Section 4. There shall be no stoppage of work either by strike or lockout because of any proposed changes in this Agreement, or disputes over matters relating to this Agreement. All such matters must be handled as stated herein.

Section 5. All grievances and disputes during the life of this Agreement shall be referred to the duly selected representative of both parties of this Agreement, the authority of these representatives to be clearly defined. In the event that these two are unable to adjust any matter satisfactorily within forty-eight (48) hours, they shall refer the same to the Labor-Management Committee.

Section 6. There shall be a Labor-Management Committee of three representing the Union and three representing the N.E.C.A. It shall meet regularly at such stated times as it may decide. However, it shall also meet within forty-eight (48) hours when notice is given by either party. It shall select its own Chairman and Secretary. All grievances and disputes not settled on the job shall be referred to the Labor-Management Committee as provided for in ARTICLE I, Section 5, of this Agreement. Any expenses incurred by the Labor-Management Committee shall be borne equally by the parties hereto.

Section 7. All matters coming before this Committee

shall be decided by a majority vote. Four (4) members of the Committee, two (2) from each of the parties hereto, shall be a quorum for the transaction of business, but each party shall be counted as though all were present and voting.

Section 8. Should this Committee fail to agree or to adjust any matter, such shall then be referred to the Council on Industrial Relations for the Electrical Contracting Industry. The decision of the Council shall be final and shall be binding on both parties hereto.

Section 9. When any matter in dispute has been referred to the Council on Industrial Relations for the Electrical Contracting Industry for adjustment, the provisions and conditions prevailing prior to the time such matter arose shall not be changed or abrogated, pending a decision from such Council.

ARTICLE II

Employer Rights—Union Rights

Section 1. No member of Local Union No. 453, while he remains a member of such Local and subject to employment by Employers operating under this Agreement, shall himself become a contractor for the performance of any electrical work.

Section 2. An employer, as the term is used in this Agreement, is a person, firm or corporation maintaining a permanent place of business, who has credit standing sufficient to meet payroll requirements, and who owns suitable and sufficient vehicles, tools and other equipment necessary to establish and maintain a business as an electrical contractor, and who is engaged in the business of electrical contracting.

The employer shall continue to have all rights which he had prior to the execution of this Agreement, except such rights as are relinquished herein.

Section 3. No individual financially connected with an employing concern shall perform any manual electrical work.

Section 4. The Union agrees that if during the life of this Agreement, it grants to any other Employer in the Electrical Contracting Industry, and better terms or conditions

than those set forth in this Agreement, such better terms or conditions shall be made available to the Employers under this Agreement and the Union shall immediately notify the N.E.C.A. of any such concessions.

Section 5. Employers operating under this Agreement shall have the right to employ men for regular maintenance work under the prevailing scale and working conditions for which such men are being furnished to other Employers.

Section 6. The Employer recognizes the Union as the exclusive representative of all its employees performing work within the jurisdiction of the Union for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment. Any and all such employees shall receive at least the minimum wages and work under the conditions of this Agreement.

Section 7. The scope of the work covered by this Agreement shall include the handling, assembling, installing, erecting, connecting and maintaining of all equipment and apparatus and the handling of all materials required in the production and use of electricity.

If overtime is being conducted by any trade or trades and temporary light or power are provided for the same, such wiring being of a temporary nature and not constituting part of the permanent system, a Journeyman Electrician shall install, move, repair and maintain such temporary equipment. However, the above is not to be interpreted as meaning that the workman is to remain idle on a stand-by basis without being assigned to other duties or work on the job by his employer.

Section 8. The duties of Stockmen and/or Drivers and Material Expeditors shall be: to handle and stock all materials in the shop; to deliver and pick up such material at job sites and material houses; to keep necessary records on all materials and to keep their Employer's shop in an orderly fashion.

Stockmen and/or Drivers and Material Expeditors shall not perform any construction work either on or off the job site and shall not fabricate or assemble any material to be used on construction jobs.

Section 9. All employees who are members of the Union on the effective date of this Agreement shall be required

to remain members of the Union as a condition of employment during the term of this Agreement. Employees who are not members of the Union and new employees shall be required to become and remain members of the Union as a condition of employment from and after the thirty-first day following the dates of their employment or the effective date of this Agreement, whichever is later.

Section 10. For all employees covered by this Agreement, the Employer shall carry Workmen's Compensation Insurance with a company authorized to do business in this State, Social Security and such other protective insurance as may be required by the laws of this State, and shall furnish satisfactory proof of such to the Union. He shall also make contribution to the Missouri Unemployment Compensation Commission. The Employer shall also carry public liability insurance on all jobs contracted for by the Employer and the Employer shall also carry liability insurance on all vehicles furnished by the Employer to the employees for the use of the employees in the scope of and during the course of their employment.

Section 11. The Employer agrees to furnish the Union a monthly payroll report covering the name, hours of work and total wage paid to each employee. The report forms shall be provided by the Union and shall be filled out and forwarded to the Union no later than the tenth day of the month following the month being reported.

Section 12. This Agreement does not deny the right of the Union or its representatives to render assistance to other labor organizations by removal of its members from jobs when necessary and when the Union or its representatives decides to do so, however, no removal shall take place until notice is first given the Employer involved.

Section 13. When such a removal takes place, the Union or its representatives shall direct the workmen on such job to carefully put away all tools, material, equipment or any other property of the Employer in a safe manner. The Union will be financially responsible for any loss to the Employer due to neglect in carrying out this provision, but only when a safe place is provided for such items by the Employer.

Section 14. (A) The Employer shall recognize that Local Union No. 453 is a part of the International Brotherhood of

Electrical Workers (affiliated with the AFL-CIO) and any violation or annulment by the Employer of any Agreement with any Local Union within the IBEW shall be sufficient cause for cancellation of this Agreement provided such action is approved by the International Office of the Union.

(B) The sub-letting, assigning, or the transfer of any work in connection with electrical work to any person, firm or corporation not recognizing the IBEW as the exclusive representative of his employees shall be sufficient cause for cancellation of this Agreement provided such action is approved by the International Office of the Union.

Section 15. If any section, subsection, sentence, clause or phrase of this Agreement is held to be contrary to any act or law, such decision, acts or laws shall not affect the validity of the remaining provisions of this Agreement, and in that event, it is agreed that said section, subsection, sentence, clause or phrase of this Agreement will be amended to conform to such decision, decisions, act or laws.

ARTICLE III

Hours—Wage Payment—Working Conditions

Section 1. Eight (8) hours work between the hours of 8:00 a.m. and 4:30 p.m., with one-half ($\frac{1}{2}$) hour for a lunch period, shall constitute a work day. Forty (40) hours within five (5) days—Monday through Friday—shall constitute a work week.

Section 2. Overtime Work.

(A) All work performed outside the regular working hours as provided for in Section 1 above, Saturdays, Sundays and the following holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas Day, or days celebrated as such, shall be paid for as follows:

(1) *New building construction and remodeling work.* Double the straight time hourly rate; except on residential work.

(2) *Residential work; all trouble calls; or work of a maintenance nature,* performed between the hours of 4:30 p.m. to midnight, on weekdays, 7:00 a.m. to 8:00 a.m. weekdays, and between the hours of 8:00 a.m. to

4:30 p.m. on Saturdays, shall be paid for at one and one-half times the regular straight time hourly rate of pay.

(3) *Residential work, all trouble calls, or work of a maintenance nature*, performed from midnight to 7:00 a.m. on weekdays, midnight Friday to 8:00 a.m. Saturday, 4:30 p.m. to midnight on Saturdays, on Sundays and the following holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day, or days celebrated as such, shall be paid for at double the regular straight time hourly rate of pay.

(B) Insofar as is practicable, when overtime work is necessary, it shall be equally and impartially divided among the workmen on the job.

Section 3. No work shall be performed on Labor Day, except in cases of emergency and then only after permission has been obtained from the Business Manager of the Union.

Section 4. Zone I and Zone II wage rates have been established. Zone I includes all counties except Pulaski County in Local Union No. 453's jurisdiction. Zone II includes Pulaski County only. The minimum rate of wages shall be:
ZONE I

	Effective		
	9-1-67	9-1-68	3-1-69
General Foreman	\$5.62½	\$5.87½	\$6.02½
Foreman	5.22½	5.47½	5.62½
Cable Splicer	5.22½	5.47½	5.62½
Certified Welder (where required by Job Specs.)	5.22½	5.47½	5.62½
Journeyman	4.82½	5.07½	5.22½
Journeyman Wireman (Residen- tial work, Greene County only)	3.87½	4.12½	4.27½
Stockmen and/or Drivers and Material Expeditors:			
(A) Beginning Rate	2.19½	2.44½	2.59½
(B) With or after one year's experience	\$2.72½	\$2.97½	\$3.12½

	Effective		
	9-1-67	9-1-68	3-1-69
APPRENTICES:			
1st 1000 hr. period—45%.....	2.17	2.28	2.35
2nd 1000 hr. period—50%.....	2.41	2.54	2.61
3rd 1000 hr. period—55%.....	2.65	2.79	2.87
4th 1000 hr. period—60%.....	2.90	3.05	3.14
5th 1000 hr. period—65%.....	3.14	3.30	3.40
6th 1000 hr. period—70%.....	3.38	3.55	3.66
7th 1000 hr. period—77½%.....	3.74	3.93	4.05
8th 1000 hr. period—85%.....	4.10	4.31	4.44

ZONE II (Pulaski County)

	Effective		
	9-1-67	9-1-68	3-1-69
General Foreman	\$6.07½	\$6.32½	\$6.47½
Foreman	5.67½	5.92½	6.07½
Cable Splicer	5.67½	5.92½	6.07½
Certified Welder (where required by Job Specs.)	5.67½	5.92½	6.07½
Journeyman	5.27½	5.52½	5.67½
Stockmen and/or Drivers and Material Expeditors:			
(A) Beginning Rate	2.82½	3.07½	3.22½
(B) With or after one year's experience	3.17½	3.42½	3.57½

APPRENTICES:

1st 1000 hr. period—45%.....	2.37	2.49	2.55
2nd 1000 hr. period—50%.....	2.64	2.76	2.84
3rd 1000 hr. period—55%.....	2.90	3.04	3.12
4th 1000 hr. period—60%.....	3.17	3.32	3.41
5th 1000 hr. period—65%.....	3.43	3.59	3.69
6th 1000 hr. period—70%.....	3.69	3.87	3.97
7th 1000 hr. period—77½%.....	4.09	4.28	4.40
8th 1000 hr. period—85%.....	4.48	4.70	4.82

Section 5. Whenever shift work is being performed in two or more shifts of eight (8) hours each, the applicable scale shall be paid during a lunch period, provided said lunch period does not exceed thirty (30) minutes.

1st Shift: The regular journeyman hourly rate shall be paid.

2nd Shift: 20¢ in excess of the regular journeyman hourly rate shall be paid.

3rd Shift: 25¢ in excess of the regular journeyman hourly rate shall be paid.

This shall apply on those jobs only where one or more other crafts are working on a shift basis.

Section 6. When men are required to work on swinging scaffolds, or from a boatswain chair, or work on structures where climbing is necessary and is considered hazardous and is in excess of sixty (60) feet in height double the regular rate of pay shall be paid. The relamping of structures in excess of fifty (50) feet in height and where the work is considered of a hazardous nature, the rate shall be one dollar (\$1.00) per hour in excess of the regular rate of pay for each additional fifty (50) feet in height. Determination of whether or not work is of a hazardous nature shall be made by the Manager of the National Electrical Contractors Association, or his representative, and the Business Manager of the Local Union, or his representative.

Section 7. Wages shall be paid weekly not later than quitting time on Friday, and not more than two (2) days wages may be withheld at any time. Any workman laid off or discharged by the Employer shall be paid all his wages immediately. In the event he is not paid off, waiting time at the regular rate shall be charged until payment is made. The waiting time is not to exceed eight (8) hours in any one twenty-four (24) hour period.

Section 8. Any man reporting for work and being laid off, not having been notified the day previous of such layoff, shall receive not less than two (2) hours wages in order to gather his tools and personal belongings and shall be paid off in full immediately. In the event the employee is not paid off, waiting time at the regular rate shall be charged until payment is made. The waiting time is not to exceed eight (8) hours in any one twenty-four (24) hour period.

Section 9. The Employer shall be obligated to send to the Business Manager of the Local Union a termination report on each employee terminated showing the reason for termination and the effective date, said termination slips to be in the Business Manager's office not later than seventy-two (72) hours after employee is terminated.

Section 10. The Employer shall pay for traveling time and furnish transportation from shop to job, job to job, and job to shop, within the city limits of the City of Springfield, Missouri. Under no condition shall any workman furnish, lease, rent or provide any vehicle, truck or car for transportation of tools or material.

Section 11. (A) On all jobs requiring as many as three (3) journeymen, one (1) journeyman shall be designated as Foreman by the Employer. Whenever a Foreman has been designated, the highest rate received by a Foreman shall be paid to one Foreman for the duration of said job.

(B) On jobs normally requiring less than three (3) journeymen, three (3) journeymen and one (1) apprentice may simultaneously work on such job for a total of sixteen (16) work hours or less without a Foreman being designated or required.

(C) A Foreman shall not have more than eight (8) journeymen under his supervision at any time.

(D) On all jobs requiring two (2) Foremen, one (1) Foreman shall receive an additional forty cents (40¢) per hour.

(E) On all jobs requiring as many as three (3) Foremen, there shall be a General Foreman in charge.

Section 12. On all jobs requiring a General Foreman or Foremen, the Employer shall select the General Foreman or Foremen.

Section 13. On jobs having a Foreman, workmen shall not take directions or orders or accept the layout for any work from anyone except the Foreman. In the absence of the Foreman from the job site, the General Foreman may give orders to the workmen. In the absence of the General Foreman and Foreman, the Employer or his representative may give orders to the workmen.

Section 14. No Job Foreman of one job shall at the same time perform work on another job as Job Foreman.

Section 15. Duties of the Foreman shall be to represent the interest of the Employer on the job. He shall do such superintendence as the nature of the work requires and, irrespective of the number of men employed on the job, the Foreman shall devote the rest of his time to working with the tools along with the journeymen.

Section 16. On all jobs where a Foreman is not required,

the Employer shall designate one workman to be in charge of the job.

Section 17. The Employer recognizes the right of the Union to appoint a Steward at any shop or on any job where workmen are employed under the terms of this Agreement whose duties will be to see that the terms and conditions herein are observed on such job or at such shop. No Steward shall be discriminated against by any Employer because of the faithful performance of his duties as Steward.

Section 18. On all jobs employing two (2) or more journeymen, if available, every third (3rd) journeyman shall be fifth (50) years of age or older.

Section 19. When men are directed to report to a job and do not start to work due to weather conditions, lack of material or other causes beyond their control, they shall receive two (2) hours pay unless notified before 7:00 a.m.

Section 20. Any workman who has been ordered to report on a job at a certain time and is unable to do so for any reason must notify the Employer at least one (1) hour in advance of the time at which he was ordered to be on the job.

Section 21. Journeymen shall not be required to provide themselves with more than the following tools: pocket knife, pencil, six-foot folding rule, two pair pipe pliers, side-cutting pliers, diagonal pliers, long-nose pliers, set of screw drivers (not over 8"), balpeen hammer, claw hammer, center punch, blow torch, combination square, pipe wrench 14", wood chisel—small, hacksaw frame, keyhole saw frame (no blades), bit brace, torpedo level, plumbob, pipe reamer $\frac{1}{4}$ " to $1\frac{1}{2}$ ".

Section 22. The Employer shall furnish all other necessary tools, material or equipment. Workmen will be held responsible for the tools or equipment issued to them, providing the Employer furnishes the necessary lockers, tool boxes or other safe places for storage.

Section 23. The Employer shall provide a safe place for the workmen's tools. If no such place is provided, the Employer shall furnish transportation for the men and tools from shop to job and job to shop each day.

Section 24. There shall be no restrictions of tools, machinery or anything simplifying electrical construction work, nor the use of appliances such as pipe-cutting machinery,

electrical and pneumatic drills, electric hoists and other similar tools, provided however, that such tools or machines are not detrimental to the health and safety of the workmen. Such tools or machines are to be operated by journeymen employed under this Agreement unless approval of the Business Manager of the Union permits otherwise.

Any pipe, wire, service assemblies or other material necessary for the job, including hangers and brackets, not cut, bent, fabricated or assembled on the job, shall be cut, bent, fabricated or assembled by employees who receive the prevailing journeyman electrician's rate of pay. The above does not apply to factory made standard catalog items.

Section 25. An employee using powder-actuated tools shall be thoroughly trained in the operation of these tools and shall carry an operator's card in accordance with training procedures and recommendations as outlined by a recognized powder-actuated tool manufacturer.

Section 26. Workmen shall install all electrical work in a safe and workmanlike manner and in accordance with applicable code rules and control specifications.

Section 27. On all energized circuits or equipment of 440 volts or over, two or more journeymen must work together as a safety measure.

Section 28. A journeyman shall be required to make corrections on improper workmanship for which he is responsible on his own time and during regular working hours, unless errors were made by order of the Employer or the Employer's representative. Employers shall notify the Union of workmen who fail to adjust improper workmanship and the Union assumes responsibility for the enforcement of this provision.

Section 29. The official representative of the Union and the Employer shall be allowed access to any building at any reasonable time where employees are at work.

Section 30. The policy of members of the Local Union is to promote the use of materials and equipment manufactured, processed or repaired under economically sound wage, hour and working conditions by their fellow members of the IBEW.

Section 31. The wage rate for journeymen wiremen (residential work) as set forth in Article III, Section 4 of this Agreement shall only apply to those journeymen performing work on one- and two-family residential dwell-

ings within the confines of Greene County, Missouri. All other terms of this Agreement shall apply to the above mentioned residential work. Under no condition shall a journeyman residential wireman be permitted to work as a Class A journeyman unless written permission is granted by the Business Manager of the Union which will be for a specified period of time. This permit may be revoked by the Business Manager at his discretion.

Section 32. Any outside firm undertaking any electrical work within the territory where this Agreement applies will be allowed to bring in not more than (1) employee whose classification is covered by this Agreement.

Section 33. This written Agreement embodies the entire Agreement between the parties hereto and supersedes all other Agreements and contracts heretofore.

ARTICLE IV

Apprenticeship and Training

Section 1. There shall be a local Joint Apprenticeship and Training Committee of three (3) members representing the N.E.C.A. and three (3) members representing the Union. This Committee shall, in conformity with the National Apprenticeship and Training Standards for the Electrical Contracting Industry, make local standards governing the selection, qualifications, education and training of all apprentices and for training of journeymen and others. These standards, when adopted by the parties to this Agreement, shall be registered with the National Joint Apprenticeship and Training Committee and the appropriate State or Federal registration agency.

Section 2. Members of the local Joint Apprenticeship and Training Committee shall be selected by the party they represent. Their term of office shall be three (3) years, but they shall be subject to removal for cause by the party they represent. Vacancies shall be filled in the same manner as the original appointments were made. A Committee member may succeed himself.

The Committee shall select from its membership, but not both from the same group, a Chairman and a Secretary who shall retain voting privileges.

The Committee shall meet at least once a month and on call of the Chairman.

Section 3. (A) The Committee shall have supervision of all matters involving apprenticeship and other training, in conformity with applicable provisions of this Agreement and the registered Apprenticeship Standards. In case of a deadlock, any matter in dispute shall be referred to the parties to this Agreement for settlement. Any proposed changes in this Agreement pertaining to apprenticeship and training shall first be acted upon by the Committee before being submitted to the parties to this Agreement.

(B) The local Joint Apprenticeship and Training Committee may establish or authorize a Joint Subcommittee to be similarly constituted and selected for other than apprentice training programs.

Section 4. In order to provide diversity of training or work opportunities, the Joint Apprenticeship and Training Committee shall have full power to act on matters pertaining to transferring apprentices from one job or shop to another. The Committee may at its discretion designate the Business Manager or Training Director as its employment supervisor for the apprentices. All assignment and reassignments for work shall be issued by the referral office.

Section 5. All apprentices shall enter the program through the local Joint Apprenticeship and Training Committee, and may be removed from the program by the Committee for cause. Such removal by the Committee shall cancel their classification of apprentice and their opportunity to complete their training.

Section 6. Each Employer shall be allowed the following ratio of apprentices to journeymen:

(A) Each individual shop shall be allowed one (1) apprentice to three (3) journeymen or fraction thereof.

Section 7. The parties to this Agreement shall have a joint apprenticeship and training Trust Fund Agreement, which Agreement shall conform to Section 302 of the Labor-Management Relations Act of 1947, as amended.

Section 8. All Employers subject to the terms of this Agreement shall contribute one cent (.01¢) per hour for all hours worked by employees covered by this Agreement for the purpose of maintaining an apprenticeship and training program. This sum shall be forwarded monthly to the Trust Fund.

The Trustees authorized under the Trust Agreement provided for in Section 7 above are hereby authorized to deter-

mine the reasonable value of any facilities, materials or services furnished by either party.

All funds shall be disbursed in accordance with the Trust Agreement.

Section 9. Apprentices shall be registered with the Union and the Joint Apprenticeship Committee before being put to work.

Section 10. No apprentice shall be allowed to perform any work except when under the direct supervision of and accompanied by a journeyman. However, apprentices serving the last period of their apprenticeship shall be allowed to work alone on any job which does not exceed eight (8) hours actual working time.

Section 11. Apprentices shall provide themselves with the following tools as a minimum: six-foot folding rule, pocket knife, side-cutting pliers, pencil, two pair pipe pliers, set of screw drivers (not over 8"). Apprentices shall not furnish over the required amount of tools listed for journeymen as in ARTICLE III, Section 21.

ARTICLE V

National Electrical Benefit Fund

Section 1. It is agreed that in accord with the National Employees Benefit Agreement entered into between the National Electrical Contractors Association and the International Brotherhood of Electrical Workers on September 3, 1946, as amended, that unless authorized otherwise by Article 5, Section 2(a) or 2(b) of the National Employees Benefit Agreement the individual employer will forward monthly to the designated Local Employees Benefit Board an amount equal to one percent (1%) of his gross monthly labor payroll, which he is obligated to pay to the employees in this bargaining unit, and a completed payroll report prescribed by the National Board. The payment shall be made by check or draft and shall constitute a debt due and owing to the National Board on the last day of each calendar month, which may be recovered by suit initiated by the National Board or its assignee. The payment and the payroll report shall be mailed to reach the office of the appropriate Local Board not later than seven (7) calendar days following the end of each calendar month.

In the event the Employer is authorized by Article 5,

Section 2(b) of the National Employees Benefit Agreement to make the required payments on a time basis other than the monthly basis previously stated, such Employer shall be obligated by this Agreement to comply with the provisions of the said Article 5, Section 2(b) of the National Employees Benefit Agreement.

Individual employers who fail to remit as provided above shall be additionally subject to having this Agreement terminated upon seventy-two (72) hours notice in writing being served by the Union, provided the individual employer fails to show satisfactory proof that the required payments have been paid to the Local Employees Benefit Board.

The failure of an individual employer to comply with the applicable provisions of the National Employees Benefit Agreement shall also constitute a breach of this Labor Agreement.

ARTICLE VI

Health and Welfare

Section 1. On September 1, 1965 the parties hereto agreed to the establishment of a Trust for the purpose of providing health and welfare benefits for employees covered by this Agreement and their dependents. The Employers agree to make contributions which are to be forwarded monthly in the amount of fifteen cents (15¢) per hour for all hours worked by employees covered by this Agreement.

Section 2. The contributions, together with a monthly payroll report as may be required, shall be mailed to reach a depository office designated by the Trustees of the Health & Welfare Fund not later than the tenth (10th) day of the month following the month in which wages were paid.

Section 3. The Trustees of the Health & Welfare Fund shall consist of three (3) representatives from Local Union No. 453 and three (3) representatives from the N.E.C.A.

ARTICLE VII

Vacation

Section 1. On September 1, 1967 the parties hereto agreed to the establishment of a Trust for the purpose of providing vacation benefits for employees covered by this Agreement. The Employers agree to make contributions which are to

be forwarded monthly in the amount of four percent (4%) of his gross labor payroll paid to the employees covered by this Agreement.

Section 2. The contributions, together with a monthly payroll report as may be required, shall be mailed to reach a depository office designated by the Trustees of the Vacation Trust Fund not later than the tenth (10th) day of the month following the month in which wages were paid.

Section 3. The Trustees of the Vacation Trust Fund shall consist of three (3) representatives appointed by Local Union No. 453 and three (3) representatives appointed by the N.E.C.A.

ARTICLE VIII

Referral Procedure

In the interest of maintaining an efficient system of production in the Industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area and of eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicants for employment:

1. The Union shall be the sole and exclusive source of referrals of applicants for employment.

2. The Employer shall have the right to reject any applicant for employment.

3. The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union and such selection and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of Union membership policies or requirements. All such selection and referral shall be in accordance with the following procedure.

4. The Union shall maintain a register of applicants for employment established on the basis of the groups listed below. Each applicant for employment shall be registered in the highest priority group for which he qualifies.

GROUP I All applicants for employment who have four (4) or more years experience in the

trade, are residents of the geographical area constituting the normal construction labor market, have passed a journeyman's examination given by a duly constituted Local Union of the IBEW and who have been employed for a period of at least one (1) year in the last four (4) years under a collective bargaining agreement between the parties to this Agreement.

GROUP II All applicants for employment who have four (4) or more years experience in the trade and who have passed a journeyman's examination given by a duly constituted Local Union of the IBEW.

GROUP III All applicants for employment who have two (2) or more years experience in the trade, are residents of the geographical area constituting the normal construction labor market and who have been employed for at least six (6) months in the last three (3) years in the trade under a collective bargaining agreement between the parties to this Agreement.

GROUP IV All applicants for employment who have worked at the trade for more than one (1) year.

If the registration list is exhausted and the Union is unable to refer applicants for employment to the Employer within forty-eight (48) hours from the time of receiving the Employer's request, Saturdays, Sundays and holidays excepted, the Employer shall be free to secure applicants without using the referral procedure, but such applicants, if hired, shall have the status of "temporary employees." The Employer shall notify the Business Manager promptly of the names and Social Security Numbers of such temporary employees, and shall replace such temporary employees as soon as registered applicants for employment are available under the referral procedure.

DEFINITIONS

"Normal construction labor market" is defined to mean the following geographical area:

This area shall include the following named counties in the State of Missouri: Christian, Dallas, Douglas, Greene, Hickory, Howell, Laclede, Oregon, Ozark, Polk, Pulaski, Shannon, Stone, Taney, Texas, Webster and Wright.

The above geographical area is agreed upon by the parties to include the areas defined by the Secretary of Labor to be the appropriate prevailing wage areas under the Davis-Bacon Act to which this Agreement applies, plus the commuting distance adjacent thereto, which includes the area from which the normal labor supply is secured.

"Resident"—means a person who has maintained his permanent home in the above defined geographical area for a period of not less than *one (1) year* or who, having had a permanent home in this area, has temporarily left with the intention of returning to this area as his permanent home.

"Examinations"—An "examination" shall include experience rating tests if such examination shall have been given prior to the date of this Agreement, but from and after the date of this Agreement shall include only written and/or practical examinations given by this Local Union, or any other duly constituted Local Union of the IBEW. Reasonable intervals of time for examinations are specified as thirty (30) days. An applicant shall be eligible for examination if he has four years experience at the trade.

5. The Union shall maintain an "out-of-work list" which shall list the applicants within each group in chronological order of the dates they register their availability for employment.

6. Employers shall advise the Business Manager of the Local Union of the number of applicants needed. The Business Manager shall refer applicants to the Employer by first referring applicants in GROUP I in the order of their places on the "out-of-work list" and then referring applicants in the same manner successively from the "out-of-work list" in GROUP II, then GROUP III, and then GROUP IV. Any applicant who is rejected by the Employer shall be returned to his appropriate place within

his GROUP and shall be referred to other employment in accordance with the position of his GROUP and his place within the GROUP.

The only exceptions which shall be allowed in this order of referral are as follows:

- (A) When the Employer states bona fide requirements for special skills and abilities in his request for applicants, the Business Manager shall refer the first applicants on the register possessing such skills and abilities.
- (B) If the age ratio clause in the Agreement calls for the employment of an additional employee or employees on the basis of age, the Business Manager shall refer the first applicant on the register satisfying the applicable age requirement provided, however, that all names in higher priority groups, if any, shall first be exhausted before such over-age reference can be made.

7. An Appeals Committee is hereby established composed of one member appointed by the Union, one member appointed by the N.E.C.A. and a Public Member appointed by both of these members. In the event the Union Member and the N.E.C.A. Member cannot agree upon such Public Member, the Public Member of the Benefit Board, to which Employers under this Agreement make their pension contributions, shall appoint such Public Member of the Appeals Committee.

It shall be the function of the Appeals Committee to consider any complaint of any employee or applicant for employment arising out of the administration by the Local Union of Sections 3 to 7 of ARTICLE VIII of this Agreement. The Appeals Committee shall have the power to make a final and binding decision on any such complaint which shall be complied with by the Local Union. The Appeals Committee is authorized to issue procedural rules for the conduct of its business, but it is not authorized to add to, subtract from, or modify any of the provisions of this Agreement and its decisions shall be in accord with this Agreement.

8. A copy of the referral procedure set forth in this Agreement shall be posted on the Bulletin Board in the

offices of the Local Union and in the offices of the Employers who are parties to this Agreement.

9. Apprentices shall be hired and transferred in accordance with the Apprenticeship Provisions of the Agreement between the Parties.

IN WITNESS WHEREOF, the parties herto have executed this Agreement and have caused their respective names to be subscribed to this Agreement this day of , 1967, by the respective representatives, all of whom are thereunto duly authorized by their respective principals.

SIGNED FOR: Springfield Division
Greater Kansas City Chapter,
National Electrical Contractors
Association, Inc.

HARRY L. LEIDY, *Chairman*

EFTON A. STANFIELD, *Manager*

SIGNED FOR: Local Union No. 453
International Brotherhood of
Electrical Workers.

JOHN S. BEATTY, *President*

JACK F. MOORE, *Business Manager*

Subject to the approval of the
International President of the
International Brotherhood of
Electrical Workers.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

ROBERT SCRIVENER, d/b/a
A A ELECTRIC CO.

and

Case 17—CA—3519

LOCAL 453, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

James G. Walsh, Jr., Esq.,
of Kansas City, Mo.,
Counsel for the General
Counsel.

Donald W. Jones, Esq., of
Church, Prewitt, Jones,
Wilson and Karchmer of
Springfield, Mo., for
the Respondent.

Benjamin J. Francka, Esq.,
Jack Moore and Ray
Edwards of Springfield,
Mo., for the Charging
Party.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JOHN M. DYER, Trial Examiner: On March 21, 1968,¹ Local 453, International Brotherhood of Electrical Workers, AFL—CIO, hereinafter referred to as the Union, the IBEW, or Local 453, filed a charge alleging violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, by Robert Scrivener, d/b/a A A Electric Co., herein called Respondent, Scrivener, or the Company. This charge was amended on May 13 to additionally allege violations of Section 8(a)(4) of the Act.

¹ Unless otherwise specified all dates herein occurred in 1968.

The Regional Director of Region 17 of the National Labor Relations Board, herein called the Board, issued a complaint and notice of hearing in this case on May 17 alleging that Respondent violated: (1) Section 8(a)(4) of the Act by the discharge of four employees on April 18 and the refusal to reinstate three of them; (2) Section 8(a)(3) by discharges of three employees on March 19 and 20, layoffs of two employees on March 27 and refusals to reinstate one of these employees; (3) Section 8(a)(5) of the Act by refusing to bargain with the Union on and after March 18; and (4) Section 8(a)(1) by interrogating employees, threatening them with loss of employment, and blackballing them from other employment and encouraging employees to join a union of Respondent's choice and polling them to ascertain their union sympathy.

Respondent's answer admits that the Union is a labor organization, that Respondent is a sole proprietorship in Springfield, Missouri, and that the charges were filed and received but denies both that Respondent is subject to the jurisdiction of the Board and the remaining allegations of the complaint.

The threshold question here is whether without discretionary jurisdictional standards being met, the Board should assert jurisdiction on a statutory basis since the complaint alleges interference with employees because they met with and gave evidence to a Board agent conducting the investigation of this case. If this question is answered affirmatively there are subsidiary questions such as the reasons for termination of employees and the motivation of the other acts alleged, the termination of which is based mainly on the credibility of the witnesses.

All parties were afforded full opportunity to participate and to examine and cross-examine witnesses in the hearing held June 25 and 26, at Springfield, Missouri. All parties have filed extensive briefs which have been carefully considered.

Upon the complete record in this case and on my evaluation of the reliability of the witnesses based both on the evidence received and my observation of their demeanor and on the fact that certain portions of General Counsel's evidence are undenied and therefore stand uncontradicted by Respondent, I hereby make the following:

FINDINGS OF FACT

I. The Business Involved and the Labor Organization

Respondent Robert A. Scrivener does business as A A Electric Co. and is a sole proprietor maintaining his place of business in Springfield, Missouri, where he is primarily engaged as an electrical contractor installing wiring and electrical fixtures, etc., in residential construction. During 1967 Respondent's gross revenues totaled \$68,938.81 and during such time Respondent purchased from Graybar Electric Company goods and materials used in electrical contracting work in the amount of \$23,126.62.

Mr. George A. Griffin, branch manager of the Graybar Electric facility in Springfield, Missouri, for the past 13 years, testified that he had been a branch manager for some 2 years prior to that and was familiar with the names and origins of the supplies and equipment maintained and sold in Graybar's Springfield facility. He testified that Graybar is a nationwide company with 147 locations and that it had done and was currently doing business with Respondent. Graybar's Springfield facility is under a regional office in Kansas City which maintains audited copies of the accounts of the customers of the local Graybar facilities in its region. The local facilities such as Springfield maintain unaudited copies of the sales tickets or purchase orders of each customer and so have a current minimal figure of each customer's account.

Mr. Griffin testified that in response to General Counsel's request, he had contacted his regional office in Kansas City and that the business records maintained there reflected that Respondent's purchases in 1968 until shortly prior to the hearing amounted to approximately \$18,000. Mr. Griffin further testified that he had checked the records kept locally and for a 7-week period, March 21 until May 9, determined that Respondent's purchases amounted to \$4,769.33 as a minimum figure.

Griffin was asked to estimate from his knowledge of the stock maintained locally by Graybar the percentage of materials which originated outside of Missouri and answered that about 95 percent of the goods came from out of State. He was then asked to use the copies of the purchase orders available to him and estimate the percentage of goods bought by Respondent which originated from out of State

and estimated that approximately 90 percent of Respondent's purchases were of goods which originated outside of Missouri. From these figures for less than half of 1968, it would appear that projected for the full year Respondent's purchases from this one supplier, Graybar, of goods which originated from out of State would be in excess of \$30,000.

Griffin's knowledge of the origin of the goods sold at this facility is based on company records, his knowledge of the business, and his management of this facility for a number of years. His estimates are therefore entitled to weight by me and I credit them.

I conclude and find that Respondent does not meet the Board's discretionary jurisdictional standards, but that the amounts involved are clearly more than *de minimis* as the Board has determined that standard before, and that Respondent's purchases of goods shipped in interstate commerce has an impact on and affect interstate commerce, and that statutory standards for Board jurisdiction have been met here.

General Counsel and the Charging Party urge the Board to exercise jurisdiction here because a part of this case involves the question of whether Respondent has abused Board processes and violated the statutory right of individuals to resort to Board processes by discharging individuals in violation of Section 8(a)(4). They contend that in such a situation public policy demands that the Board exercise its jurisdiction to the fullest extent possible.*

Respondent argues that the jurisdictional facts are *de minimis* at best (a point I have rejected), and that it would be unjust and a violation of the constitutional guarantees of equal protection and due process for the Board to assert jurisdiction here. Respondent's latter claim as set forth in its brief alleges that small businesses such as this can be made to answer for violations of the Act merely by the General Counsel using the ploy of alleging that Section 8(a)(4) of the Act has been violated while such a company would be denied an opportunity to use the election processes of the Board. This argument begs the issue of the *Pederson*

* See *Philadelphia Moving Picture Machine Operators' Union Local No. 307 I.A.T.S.E. (Vello Jacobucci)*, 159 NLRB 1614, and *Eugen Pederson v. N.L.R.B.*, 234 F.2d 417 (C.A. 2).

case, *supra*, since assertion of jurisdiction ultimately will be based on the determination of whether such a company has violated Section 8(a)(4) of the Act. If after hearing the evidence the answer is that the company has not breached Section 8(a)(4) then there is no reason to assert jurisdiction in vindication of public policy, and jurisdiction of the matter would be declined.

In furtherance of its position Respondent argues from the facts of the instant case and from decisions it has interpreted that a violation of Section 8(a)(4) can not be shown here and that the complaint should be dismissed. As will be seen herein, I have determined that Respondent did violate Section 8(a)(4) of the Act, thereby interfering with Board processes and in violation of public policy and accordingly recommend that the Board assert its statutory jurisdiction in this matter.

Accordingly, I conclude and find that it will effectuate the purposes of the Act for the Board to assert its statutory jurisdiction over this Respondent, since Respondent's activities affect interstate commerce and do have an impact thereon.

Respondent admits and I find that Local 453, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. *Background and Undisputed Facts*

Robert Scrivener testified he has been an electrician since 1936 and has belonged to either the Union herein or to another IBEW local in Tulsa, Oklahoma, for approximately 20 years. Approximately 3 years ago Scrivener started his present business as A A Electric Co., which he runs from a shop next to his home in Springfield, Missouri. His wife assists him by apparently handling the bookkeeping and clerical functions. Materials and supplies are kept at the shop and the employees report there to load their trucks and receive their assignments, and return there after work.

Although Respondent's principal work has been in the area of residential construction, Scrivener has had some commercial work such as wiring apartment houses. In mid-March Scrivener had work in a number of single-family homes, one or more duplexes, and at least one apartment

house. At that time he had six employees; three journeymen, Wesley Smith, an employee since August 1966, Albert Wilson from early 1965 until early 1966 and from February 1967 on, and Bill Cockrum since February 1968; and three apprentices or helpers, Claude Sanders employed from February or March 1967, Charles "Don" Cockrum employed on 4 or 5 different occasions over the 3-year period with the last beginning January 1968, and Boyd Perryman.

There is disagreement as to the manner of termination of the employees on various dates although there is no disagreement as to the dates they ceased working for the Company nor that Respondent hired two new employees after learning of the union activities of five of the six employees it had in mid-March. Further there is disagreement regarding some of the statements Scrivener is alleged to have made but there are certain remarks and actions of his which are undenied.

The parties agree that the unit appropriate for collective bargaining at Respondent is "All employees employed by the Respondent excluding office clerical employees, guards and supervisors as defined in the Act."

The Union and the General Counsel claim that the makeup of the unit as of the morning of March 19, the time when the union representatives met with Respondent and orally claimed a majority and demanded recognition, is the proper one on which to determine majority status. Under this theory the unit consisted of the six employees named above.

Respondent at the hearing took the position that the unit for purposes of determining majority should consist of the six employees named above plus the employees it had at the time of the hearing. These additional employees would be journeyman Clyde Hunt, hired by Scrivener on March 19 after his meeting with Union Officials Jack Moore and Ray Edwards, apprentice Jim Statton hired by Scrivener on March 20 or 21, Richard Claybaugh,* an employee of an-

* Under applicable Board law neither Claybaugh or Albert Hunt qualify as employees entitled to a voice in determining a bargaining agent since both from Scrivener's description are casual employees working only when they felt like it and then only if Respondent has work available. Additionally, Albert Hunt would seem to be further disqualified as a summer part-time employee with no expectation of future employment. Accordingly, I conclude and find that neither of them can be considered as employees in determining the employee complement on which to determine majority status.

other firm who works for Scrivener when he wants to do so if Scrivener has work available, and Albert Hunt,³ Clyde Hunt's son, who works part time during school vacation in the summer when he wants to work and Scrivener has work available. Respondent also claims that Clyde Hunt and Claybaugh had both worked before March 20 and should be included in the unit if March 20 were the appropriate date for unit determination. Finally at the hearing Respondent said the Board should determine the appropriate date and the employee complement.

In its brief Respondent changes its position completely on these matters and asserts that the Union did not make a true legal demand on it during the March 19 meeting, since it claims the Union demanded it then sign a contract containing nonmandatory bargaining subjects. The first legal demand, according to its theory, occurred on March 21, when it received the Union's letter containing a demand and alleging that it had violated the Act. Respondent states that on that date its employee complement consisted of Claude Sanders, Don Cockrum, Boyd Perryman, Clyde Hunt, Jim Statton, and Richard Claybaugh, and that only Cockrum had signed a union card of this group.⁴ Under its theory employees Bill Cockrum, Wilson, and Smith had separated themselves from its employ on March 20 and were not part of the unit.

As can be seen from Respondent's shifting positions, it did not have an original theory in regard to these questions either when it refused to bargain with the Union, or at the trial of this matter, but rather has fashioned a theory to suit its version of the facts following the hearing.

Respondent however maintained one other position relevant to the refusal-to-bargain allegation and that is that when he was shown the five union authorization cards, Scrivener claims he had a good-faith doubt as to the genuineness of the signatures. His contradictory testimony in regard to this point and my decision that Scrivener acted in bad faith will be set forth below.

In their testimony it appeared to me that Wilson, Smith, Sanders, and Bill Cockrum testified straightforwardly and tried to state the facts as they remembered them. Scrivener

⁴ Respondent forgets that Sanders had also authorized the Union to represent him by signing an authorization card.

however testified to different things depending on who was questioning him and contradicted himself on a number of items such as whether he did or did not tell Jack Moore he doubted the genuineness of the signatures on the union authorization cards. Further Scrivener's undenied actions contradicted some of his testimony.

As to employee "Don" Cockrum I have determined to credit his testimony where it is substantiated either by his affidavit or other independent testimony. Cockrum has been placed in a peculiar position by the circumstances existing at the time of this hearing. Sometimes after his layoff on April 18, Cockrum was arraigned on a criminal charge and has a preliminary hearing. Through the intercession of "Don" Cockrum's "in-laws" Schrivener rehired him and through or with Scrivener's acquiescence, he met with Respondent's Attorney Jones, who was at that time Respondent's counsel in this matter, and retained him as his counsel in the criminal action. Cockrum's retention of Jones occurred after the issuance and service of the complaint in this matter and despite the fact that the complaint contained an allegation that "Don" Cockrum had been discharged by Respondent in violation of Section 8(a)(4) of the Act. When these facts came out during the hearing, Attorney Jones drew from Cockrum an agreement that Jones had told Cockrum that the two matters must remain separate and distinct.

I feel that this situation placed Cockrum in a most unenviable position when he was prepared, according to his affidavit, to testify against the Employer who had now rehired him at the behest of Cockrum's "in-laws" with a criminal charge hanging over him. Here he was to testify against the interest of this employer who is represented by an attorney upon whom Cockrum relies to defend him in a criminal action. The feelings of mortal man and his emotions can not be separated or compartmentalized to the degree Attorney Jones suggested to Cockrum and to expect such is asking the impossible of fallible beings, as Cockrum's testimony amply demonstrated. I feel that both Attorney Jones and "Don" Cockrum erred in their judgment in creating such a situation.

After commencing his testimony "Don" Cockrum, according to counsel for the General Counsel, answered questions differently and contrary to the manner in which he

had responded in preparation for the case and contrary to his affidavit and General Counsel claimed surprise. On the basis of this claim and Cockrum's general demeanor, General Counsel was allowed to proceed with some leading questions. It became evident to me that Cockrum was seeking to distort and change his testimony to place Respondent's case in a more favorable light. When Cockrum identified the affidavits he had given and was reminded of the oaths he had taken in giving the affidavits and as a witness in this hearing, his testimony began to agree with the previous affidavits in all but one major respect. That point will be discussed *infra*. When Cockrum's oral testimony is contrary to the interest of Respondent and in accord with his sworn affidavit, I credit it, and where his testimony is contrary to his verified affidavits and the testimony of others, I must discredit his oral testimony under these circumstances. Respondent has no basis for complaint of such credibility resolutions since they result from a situation created by Respondent or Respondent's counsel.

Recitation of the events hereafter is based either on uncontradicted testimony or contradicted testimony where I have resolved credibility conflicts in accord with the observations made above and the weight of the evidence.

B. The Events

1. On March 15, while working at a jobsite on Pinehurst with his helper Claude Sanders, Wesley Smith was approached by Scrivener who, after looking over the jobsite, asked him to come to the truck. There Scrivener broached to Smith the proposition that the Company's employees join District 50,⁵ with the result that they might get a lot of commercial work and have some residential work as fill-ins rather than have mainly residential work. Scrivener asked whether Smith would talk to the men when he got to the shop that evening about going into District 50. Smith agreed to do so.

I find and conclude that Respondent by this action encouraged his employees to join a labor organization of his choosing and that he thereby violated Section 8(a)(1) of the Act.

⁵ District 50 is District 50, of the United Mine Workers of America, which organization has an office in Kansas City.

2. Albert Wilson testified that when he returned to the shop on the evening of March 15, all the men had gotten there but Smith and Sanders. Scrivener told the men to hang around a few minutes that Smith wanted to talk to them but that he could not say what it was about because he was not supposed to know. A few minutes later Scrivener told the men that it concerned their joining District 50.

When Smith came in he asked each of the men what they thought about joining the Union. Most of the men indicated that they would join District 50 and others indicated that they would go along with the majority. On conclusion of this polling of the men as to their union sentiments, Smith turned to Scrivener and told him "there it is." Scrivener told them that several electrical contractors in the vicinity belonged to District 50 and were doing real good. Wilson mentioned that there was a picket on one of the companies at that time. Scrivener said he would either write or go see District 50 in Kansas City. Some further discussion was had among the men.

I conclude and find that Smith was acting as an agent of Scrivener in conducting this poll of the employees to ascertain their union sympathy and that Respondent thereby violated Section 8(a)(1) of the Act.

3. In the evening of March 15, Bill Cockrum telephoned Scrivener and asked what he thought of Local 453. Scrivener replied he would not join with Local 453 although he had been a member of that Union at one time, and that he could not afford to belong to the National Electrical Contractors Association, herein called NECA, and pay the 2-percent assessment.

Later that evening Cockrum called Ray Edwards of Local 453 and discussed the situation, asking if Local 453 was willing to represent them. Edwards said they would and a meeting was arranged for Monday, March 18. Bill Cockrum thereafter talked to Wilson and others concerning the situation and meeting with Local 453.

4. On the evening of March 18, Bill and "Don" Cockrum, Smith, Sanders, and Wilson met with union representatives, Moore and Edwards, at the union hall. The men told Moore and Edwards of the events and said they did not want to join District 50. Moore said Local 453 would represent them and asked them to sign union authorization cards saying he knew Scrivener and would see him and if necessary show

Scrivener the authorization cards to prove he was authorized to represent them. He added that if Scrivener would not agree to recognize the Union he could use the cards to petition for an election. Moore then answered questions as to their becoming union members and assured the five men that they could take the wireman's examination and there would be no problems regarding their ages. All five men then signed union authorization cards.

After the meeting Moore called Scrivener and asked to meet with him the next day. Scrivener agreed to come by the union hall the following morning.

5. Moore and Scrivener had known one another for 20 years or so and talked about a number of topics on Tuesday morning, March 19, before getting to the reason for the meeting. Moore told Scrivener the Union represented a majority of Scrivener's employees and wanted a contract with him. Scrivener said that he doubted that the Union had a majority of his employees. To resolve Scrivener's doubt Moore showed him the signed cards. Scrivener said Moore had one card more than he had employees. Moore said it was just the opposite that Scrivener had one more employee, Perryman, who had not signed a union card. Edwards asked Scrivener which card he was questioning and Scrivener replied "Don" Cockrum. Edwards said he had seen Cockrum on the job the previous day. Scrivener acquiesced saying he guessed Cockrum was working.

Scrivener asked if Moore wanted him to send the men to the union hall. Moore said no that Scrivener was to keep the employees, that they would work out a contract. Scrivener asked if he could get additional men from the hiring hall if he was to expand his business and Moore assured him he could. Scrivener said he was going to talk to his attorney and would get in touch with Moore thereafter and that he was not sure about an agreement since there was another organization that the people might be tied to. Moore said there was no fear of that, the IBEW was the only organization involved and he said this information from the people themselves. Scrivener asked about a contract and Edwards gave him a copy of the construction agreement.

Scrivener testified that Moore gave him a deadline of 6 p.m. to sign the union contract and that Moore said he

would replace all of Scrivener's men with good men from the union hall.

I have no doubt that the Union would have liked to have Scrivener sign a standard contract as soon as possible, but I do not believe Scrivener was given a deadline nor that Moore and Edwards said Scrivener's men would be replaced by men from the union hall. I credit the testimony of Moore and Edwards against Scrivener, noting further that such tactics would virtually make it impossible for the Union to organize any company if the employees who sought to be represented would immediately be replaced by other union members upon the signing of a union contract. Such a self-defeating tactic would become known quickly in the trade and would halt any organizational activities the Union attempted.

It is clear that Scrivener reported such statements to employees thereafter, seeking thereby to frighten them away from the Union in an attempt to undermine the Union's majority. I conclude that Scrivener's testimony is not to be credited.

In its brief Respondent claims that the testimony taken as a whole demonstrates that Scrivener's claim that Moore demanded he sign the particular agreement, join NECA and pay it a 2-percent fee is borne out by the fact that the Union agreed that all of its signatories in the area are either members of NECA or have agreed to be bound by that contract. The construction agreement calls for a payment of 1 cent an hour towards an apprenticeship and training program, a further amount of 1 percent of the gross monthly payroll to be paid into a benefit fund, a contribution of 15 cents an hour for payment of a health and welfare fund, and an amount of 4 percent of the gross payroll toward a vacation fund. Respondent has not made clear whether the 2 percent it speaks of is a part of the above amounts or is a membership fee for NECA or just what it represents. I can only determine from the evidence before me that the Union does have signatories who agree to be bound by the terms of the NECA contract and are not NECA members and do not assume the obligation of NECA membership or dues and fees. I find that the Union did not demand that Respondent join NECA as a part of any contractual agreement between Respondent and the Union and that Respondent's claim in this direction is not true.

6. During March 19, Scrivener visited the jobsites several times and first appeared at the jobsite where Wilson, Smith, Sanders, and Perryman were working shortly after his meeting with Moore and Edwards.

Wilson testified that it was about 10:30 a.m. when Scrivener came in the apartment house jobsite and said, "Bud did you guys sign those cards at the hall last night?" Wilson replied "Yes," and Scrivener asked what they wanted to do it for. Wilson said they thought Scrivener wanted a union. Scrivener said he didn't want it and asked if they knew what they had done. Wilson said they were trying to better themselves. Scrivener said that he had just come from the union hall and that Jack Moore told him that if they organized Scrivener, that Scrivener could not keep his present employees, and that the Union would replace them with good men. Scrivener said the men knew they could not go to work for another shop and he was telling them this for their own good. Wilson said he had known Moore for several years and could not believe Moore said that. Smith and Perryman came in the room and Scrivener noted that Perryman was the only one who had not signed a card and said something about letting everyone go. Smith and Wilson told Scrivener they were going through with the Union.

7. After lunch Scrivener came back to the apartment and asked Wilson if he had seen Doyle Luce, of Aton Luce Electrical Contractors. Wilson said he had not. Scrivener said Luce was supposed to come by and give him a bid on finishing the apartment job. Scrivener told Wilson and the others to get everything roughed in, that they were going to have to get somebody else to finish the job and at quitting time they were to take all the materials and supplies back to the shop and to wait there because he wanted his lawyer to talk with them.

8. After the morning discussion Scrivener spoke to Sanders saying he understood they had signed cards at the union hall. Sanders said that was right. Scrivener said he had not thought the boys would do him that way and that Moore told him if he signed a contract with the Union they would not use any of the five card signers. Sanders said that if the Union operated that way he did not want any part of it.

I conclude and find that Scrivener's questioning of the

employees as to their signing union cards and threatening that they would lose their jobs as a result of their activity as set forth in 6, 7, and 8 above violate Section 8(a)(1) of the Act.

9. "Don" Cockrum rode to the shop with Scrivener after work on March 19. Cockrum orally testified that during the ride Scrivener said he might have to lay some of the guys off. He continued that if they would have come and talked to him about it he might have reconsidered but they went up there (to the Union) and signed up without talking to him. Scrivener said he would probably let Don's brother go and that the men had gotten into a mess.

"Don" Cockrum's testimony concerning Scrivener's statement about another electrical contractor is contrary to his affidavit. Cockrum stated orally that Scrivener told him electrical contractor James Mitchell was working across the street from the jobsite that day and in conversing with him, Mitchell told Scrivener that if Scrivener's men came out there looking for a job Mitchell was going to offer them \$1.25 an hour (the minimum wage and a sum far below what the men apparently were receiving).

"Don" Cockrum identified his affidavit and admitted he had sworn that its contents were true. The affidavit recites that on the trip with Scrivener to the shop, Scrivener said he would probably have to let everybody go because they had gotten him into "a hell of a mess," and he was going to have to let Don's brother go for sure since he was the ringleader, and he would really be in a mess if he earned a little bit more money (apparently referring to the Board's jurisdictional standards). Cockrum's affidavit said Scrivener told Cockrum he had called James Mitchell Electric and told Mitchell that if any of Scrivener's employees called him for a job that Mitchell was to pay them \$1.25 an hour even if he could use them, and that he had called some other contractors and they wouldn't be needing any help. Scrivener said the employees had made their beds and now they could sleep in them.

"Don" Cockrum stated the affidavit was in error and that Scrivener had not called Mitchell but that Mitchell had called Scrivener. When asked to explain why he would sign and swear to a statement containing such a distortion and particularly where he had initialed a correction right in the middle of this particular section, Cockrum replied that

he did not read it over carefully. Thereafter Cockrum admitted that Scrivener said the following two sentences reported in his affidavit: "He said he had called some other contractors and they wouldn't be needing any help. He said the employees had made their bed and now they could sleep in it."

Taking the testimony as a whole and noting again the position in which Cockrum was placed by his actions and those of Respondent and Respondent's attorney, I find that the version of the conversation concerning Mitchell contained in the affidavit is the true version of what occurred and that this was at least partially corroborated by Cockrum. It would not make sense for Scrivener to have contacted other employers to find out whether they would use his men and at the same time not have contacted Mitchell in regard to this same question.

I conclude and find that Scrivener in his conversation with Cockrum on the afternoon of March 19, violated Section 8(a)(1) of the Act by threatening employees with loss of their jobs because of their union activity.

Scrivener's statements to Cockrum about the other electrical contractors was an implicit threat of blackballing the men for their union activities and was the forerunner of and renders credible Smith's version of a telephone conversation between Scrivener and himself on March 20 in 12 below.

10. The employees got to the shop about 4:15 p.m. Scrivener opened the meeting with the men after Attorney Jones' arrival by stating Moore told him he would not be able to use the five men he presently had employed and that he would replace them with good men. Scrivener said there was no way he could be forced to join Local 453 because he did not come under the Board's jurisdictional amount of \$50,000. Jones and Scrivener apparently looked over some tax forms and agreed on the absence of the jurisdictional amount. Jones then talked to the men mentioning that the initiation fee for Local 453 was something like \$300. Bill Cockrum spoke up saying Jones was wrong, that it was \$50. Jones said he might have been thinking of the initiation fee for the Sheetmetal Workers.

After some more discussion, the three journeymen, Smith, Bill Cockrum and Wilson advised Scrivener that they wanted Local 453 as their bargaining representative.

Scrivener, who admitted he had made up his mind earlier in the afternoon to discharge the men and had asked his wife to make up their checks, got their checks from the office, brought them out, and started to hand them to the three journeymen. Bill Cockrum told Scrivener he wanted to know whether or not he was fired before accepting the check. Scrivener turned to Attorney Jones and asked what he should say. Jones said he would let them go and let Jack Moore handle them from the union hall. Scrivener nodded his head affirmatively to Cockrum and gave the three men their checks. They picked up their tools and left the shop. While walking towards their cars, Scrivener came out of the shop and said they were welcome to come back the next morning if they wanted to go to work.

11. On the morning of March 20 all the men reported for work and were given assignments by Scrivener. Smith and Bill Cockrum were scheduled to go to the apartments on South Florence Street and were loading their trucks with materials when Scrivener came outside the shop and talked to them and Wilson. Scrivener said there was one thing his attorney wanted to know and that is whether they were affiliated in any way with Local 453. The three men said they were. Scrivener said that he could not use them. The men loaded their tools and left.

I conclude and find that the discharges of Bill Cockrum, Wilson, and Smith on March 19 and 20 were violative of Section 8(a)(3) and (1) of the Act. I do not credit the tortured explanation of Scrivener that he did not want the men to get in trouble with the Union and was allowing them to leave for better jobs.

12. On the evening of March 20, Smith received a telephone call at home from Scrivener. Scrivener told Smith he would like him to come back to work and hated to see Smith's family suffer on account of this thing. Scrivener said the other contractors such as Balmer, Ivan Franks, and Jim Mitchell, had gotten together to keep them from working and that he would not find a job, while they would furnish Scrivener with men if he needed them. Smith told Scrivener he was planning on going through with the Union because he felt he could better himself. Scrivener said that if he wanted to change his mind he could come back to work within 2 weeks.

I conclude and find that Scrivener in this conversation

violated Section 8(a)(1) of the Act by threatening the employees with blackballing because they had chosen the Union as their collective-bargaining agent.

13. Following the Union's demand letter of March 20, in which it protested the discharge of the three employees on March 19 and 20 and said it was filing a charge, the Union filed a charge of 8(a)(1), (3), and (5) violations on March 21. Respondent wrote a letter to the three discharges dated March 22, which they did not receive until Monday, March 25.⁶ This self-serving letter claims that Respondent has not discharged any of the three and that they are free to report back to work on Monday morning, March 25. After contacting the Union for advice, the three men reported back for work on Tuesday, March 26, and worked that day and March 26. Cockrum left work early because of an injury to his son and when Smith and Wilson reported to the shop that evening Scrivener told them they were caught up and he would have to lay two of the three of them off for a few days. A suggestion was made that straws be drawn between the three. Smith and Cockrum were laid off following the drawing and Wilson was kept on along with new employees Clyde Hunt and Jim Statton.

14. On April 1, Wilson was sick and Scrivener called Smith, according to Wilson at his suggestion, and had Smith report back to work. Smith and Wilson continued to work until April 18 with the remainder of the employees. At that time everyone was back to work except Bill Cockrum.

⁶ The letter follows:

Gentlemen:

This letter is written to clarify the fact that I have not discharged either one of you and you are all free and welcome to work for me as usual at any time, whether or not you are members of the I.B.E.W. Union or any other union.

I will be glad to have any or all of you work as usual, so long as I have work available, which you can do, and I would be glad to have you report to work Monday morning as usual.

It was never my intention to discriminate against you in any way for any interest you may have in any union. However, I did feel it was my duty to tell you what had been told me by Mr. Jack Moore of the I.B.E.W. Union, when he demanded me to sign a contract with him, to the effect that if I signed such contract I would be required to hire all men through his hiring hall and that Mr. Moore would not permit you men to work for me, in all probability, as you would have to stand in line in the hiring hall procedure and I would have to hire the men who had first signed in the hiring hall who were without jobs.

15. On April 17, a Board field examiner met with Scrivener for several hours to discuss the charge against the Company, as well as the Company's contention made in its letter to the Regional Director of March 22, that it did not come within the jurisdiction of the Board.

That evening the field examiner met with Bill and "Don" Cockrum, Smith, Sanders, and Wilson at the union hall. The field examiner interviewed the five employees that night and only took affidavits from three of the five due to the lateness of the hour.

16. On the following morning, April 18, when Wilson went to work, Scrivener motioned him into the office and asked "Did you guys meet with the Labor Board last night?" Wilson answered yes. Scrivener said "They sure don't talk much do they?" Wilson replied no and went on out to gather material to go to the job. Later, while he and "Don" Cockrum were getting ready to go out, Scrivener came up to him again and said, "You say you met with the Labor men last night?" Wilson answered "Till about 11 or 11:30." Scrivener said "That old boy sure don't tell you nothing." Wilson answered "No Bob, he's a journeyman."

While Sanders was at the shop getting ready to go to work on April 18, Scrivener came up and asked him, "Did the boys find out anything last night?" Sanders answered not that he knew of.

Scrivener did not directly deny the testimony of Sanders and Wilson but rather testified that he had no knowledge as to whether any of the men talked to the Board field examiner prior to laying them off on April 18. He maintained that the first time he learned who had talked to the Board field examiner was when Wesley Smith told him about it. Asked when that was, Scrivener said "I would say on April 20." According to Scrivener, Smith told him the identity of the men who spoke to the field examiner while Smith was at the shop getting ready to go to work. Scrivener was not able to say where Smith was working that day and was not completely sure of the date.

Smith was not questioned about this conversation, it first being mentioned during Respondent's defense. Scrivener's guess of April 20 as the date of the conversation is obviously incorrect since Smith was laid off on April 18 and did not work for Scrivener until called back on May 4. If the con-

versation took place, and it seems possible that it did, then it must have occurred in the morning of April 18, the same day Scrivener laid Smith and the other men off.

Commonsense would indicate that when the Board field examiner was in the area investigating the case and interviewing Respondent and the case involved a claim of majority and individual discharges, that the Board examiner would investigate the charging party's case by interviewing the discharges and the individuals who made up the union majority. So it should have been no secret from Scrivener that the Board field examiner would meet with the five union card signers.

I find from the testimony of Scrivener, Sanders, and Wilson that Scrivener on April 18, knew of the employees meeting with the field examiner and the identity of the men who were interviewed by the field examiner on the evening of April 17.

I conclude and find that Scrivener's questioning of Wilson and Sanders on April 18 concerning their meeting with a Board field examiner violated Section 8(a)(1) of the Act.

17. On the afternoon of Thursday, April 18, after finishing work, the men reported back to the shop. Scrivener told Don Cockrum, Wilson, Smith, and Sanders that he had no work for them and if something came in over the weekend he would call them. He asked if they wanted their checks to save them a trip on the following Friday morning. The four men said yes and Scrivener gave them their checks. Clyde Hunt, Jim Statton, and Perryman were not laid off by Respondent and worked thereafter.

Following this layoff Sanders was never called back to work. Smith and Wilson were called back on May 4 and as noted earlier "Don" Cockrum returned to work in the early part of June.

Thus, on April 18, Scrivener laid off the remaining four employees who signed union authorization cards, having previously laid off and not recalled Bill Cockrum. In contrast he retained on his payroll Perryman, the sole remaining employee of those employed when the union organization started, and Hunt and Statton, none of whom had any part in the union organization. In fact Hunt and Statton were obviously hired to replace some of the union-affiliated employees.

Scrivener's explanation of this layoff was that the other

men were retained on jobs they had started and that he was short of work. Scrivener's explanation is not convincing. The fact is that the men were on jobs at the time and that there was some other work such as the apartment house still to be done. Further Scrivener assigned men to the jobs and could have made assignments so as to retain senior men if the amount of work available was decreasing. In making these layoffs Scrivener was retaining Statton, a man with apparently no previous experience who had been on the job less than a month while laying off more experienced helpers. Further the fact that a man had started a particular job would not seem to make any difference since the men would be following wiring diagrams in wiring a house or apartment and in any event a journeyman electrician should be capable of picking up a job at any point from any other journeyman. Certainly this was done at times when men were ill, as for instance on April 1, when Wilson was ill and advised Scrivener to call in Smith to work which Scrivener did. Certainly it would have been to Scrivener's benefit to retain more experienced helpers.

Scrivener is entitled to run his business in any manner he desires as long as it does not discriminate unlawfully against his men. His explanation as to why he laid these four men off was not clear or convincing and seems to be contrary to commonsense and good business practice. In view of the parallelism of the union activities of these men and Scrivener's layoff of them, his reasons for the layoff are not sufficient to overcome the *prima facie* case presented by the General Counsel.

In determining motive and reaching this conclusion I have noted the circumstances of the prior discharges of his employees and Scrivener's being assured by his attorney that he was not subject to the jurisdiction of the Board. The men's union activities were not open or dramatic after that. Here a new event occurs, the Board field examiner is investigating the charge and even after the harsh discipline of discharge for daring to want a union of their choice, the men go to the union hall and discuss Scrivener's actions relating to the charge in interviews with the Board field examiner. Scrivener knowing of his employees meeting with the Board field examiner and being aware of the advice that he was not subject to Board jurisdiction, summarily laid off the remaining four employees in a rather evident

attempt to demonstrate that he controlled their working conditions and to punish them for having the temerity to meet with and give evidence to the Board field examiner.

The circumstantial evidence of the event is sufficient to find that this is why Scrivener engaged in retaliation against his employees. It is not necessary that we have a confession from Scrivener to reach this result, nor that we have statements from him to indicate this is why he laid off these employees. The evidence of Scrivener's quick reaction to the concerted and union actions of his employees in the past in threatening to discharge and in discharging them, added to his hiring of new employees and his retention of them in subsequent layoffs in preference to the "union minded" employees, along with his quick reaction in laying off the four employees prior to the end of the workweek and on the same day he determined they met with the Board field examiner and while there was work for them to do, plus his determination that he was not subject to the Board's jurisdiction, and his lack of credibility in testifying, is sufficient for me to find that at least one of his reasons, and I believe it was the main reason, for laying off these four men was in retaliation for their meeting with the Board agent to give testimony regarding the charges concerning them against Scrivener and further to discourage any other employees from so doing. The immediate parallel of the factual situation is too close to be coincidental.

Respondent states that that these layoffs could not be found as violations of Section 8(a)(4),⁷ since the employees had not filed charges nor had they appeared in a Board proceeding and given testimony, and cites as his authority *N.L.R.B. v. Ritchie Manufacturing Company*, 354 F.2d 90 (C.A. 8).

With due deference to the Eighth Circuit, it appears that the Board has not so narrowly construed Section 8(a)(4) but has found that the Section is broad enough to encompass a situation such as this and I must follow the Board's line of decisions.

Section 8(a)(4) first comes into play when a charge is

⁷ Section 8(a)(4) provides that "it shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

filed with the Board. Thus an individual filing a charge becomes protected by the Act and if he is thereafter discriminated against because he filed the charge, Section 8(a)(4) has been violated. In the instant situation the Union acting as the bargaining agent for the employees filed a charge in their behalf alleging that three of them were discriminatorily discharged and that all of the employees were discriminated against by Respondent's refusal to bargain with the employees collective-bargaining agent. Thereafter the Board in exercising its statutory function sent a field examiner to secure facts concerning this charge to determine whether it had merit or not. The field examiner interviewed and discussed the charge and the jurisdictional aspects with Respondent Scrivener and thereafter interviewed the five union card signers and took affidavits from them so that the Regional Office might analyze the case to determine whether the charge had substance. I have found above that Respondent laid off these employees in retaliation for their meeting with and being interviewed by the field examiner and giving affidavits to him, all in furtherance of the Region's investigation of this charge.

I conclude and find Respondent's discharge or layoff of these four individuals in these circumstances violated Section 8(a)(4) of the Act. To accept Respondent's theory of Section 8(a)(4) would be to place a premium on form rather than substance and what seems to be clear intent. The four 8(a)(4) dischargees were already the subject of a charge involving discharge of two of them and refusal to bargain as to all of them in that the union card signers constituted five-sixths of the bargaining unit at the time of the demand. The Union which was their bargaining agent filed the charge in their behalf. To follow Respondent's theory it would be necessary for each of these men to have signed the charge individually in his own name. Clearly, anything that a principal can do, an agent with authority can do for him, and here as the bargaining agent for these men, the Union had that authority.

Secondly, the protection afforded by Section 8(a)(4) would seem not meant solely for those who signed the charge but rather to be involved at the time the charge is filed, so that employees who are called on for information by Board agents will not be discriminated against by their employers because they assisted the Board in the exercise

of its statutory function of determining the merits of a charge. To suggest otherwise would be to say that the Board must investigate the factual background of charges and that a respondent is entitled to hinder that investigation by discharging each and everyone who appeared and talked to the Board agent, as long as the employee had not performed the ministerial act of signing a charge. Clearly where Congress gave the Board the authority to investigate and determine whether charges have merit, it intended that the Board not be hindered in so doing and established the filing of the charge as the initial guide post rather than as a *sine qua non*, for the protection of those who assisted the Board, sometimes reluctantly, in the performance of its statutory functions.

Thus my conclusion that Respondent violated Section 8(a)(4) rests on two points; (1) that the signer of the charge was the agent of these individuals and, (2) that Section 8(a)(4) must necessarily apply to employees who are interviewed by and give affidavits or statements to Board agents during the Board's exercise of its statutory function to investigate and determine the merits of charges filed with it.

The Board has in essence made such findings in several cases, the most recent of which is its affirmance of Trial Examiner's decision in *Manila Manufacturing Co.*, 171 NLRB No. 151.

Respondent's brief contends that since the complaint says nothing about Wilson's termination on May 10, the separation on that date cannot be contended as illegal.

According to Wilson's testimony, after being recalled on May 4, he worked until the close of business on May 10, when Scrivener told him there was no more work for him to do, that they were caught up and not to come back to work. Respondent's examination of Wilson would indicate that Respondent felt that Wilson had quit. However, Respondent offered no direct testimony which would demand such a conclusion.

The complaint alleges discharges of Wilson, along with others, on March 19 and 20 and April 18, as well as refusals to reinstate Wilson since on or about April 18. With Respondent's demonstrated union animus and crediting Wilson, I do not credit Respondent's claim that Wilson quit but determine that he was laid off once again and as is

usual with layoffs is entitled to recall by Respondent, assuming here that the layoff was nondiscriminatory. In view of Respondent's past treatment of Wilson, I consider this short term employment by Respondent more in the nature of interim employment and not full and adequate reinstatement to which he and the others are entitled.

The problem of available work is one with which Respondent is intimately connected since Respondent was able by adjusting its bids on available work to either try to get it or not. Similarly Respondent apparently sought to subcontract the work it had on the apartment house to the Aton Luce Company. So in considering availability of work, there might be a question as to whether Respondent manipulated its work in order to have an apparent reason for laying off employees.

In regard to the 8(a)(3) allegations concerning the layoff of Bill Cockrum and George Smith on March 27 (13 above), and Respondent's refusal to reemploy Cockrum thereafter, I conclude and find that such refusals violated Section 8(a)(3) of the Act in that such layoffs for the purpose of discouraging the employees' union activities and in retaliation for their selection of the Union as their bargaining agent. The same questions regarding available work may be raised here as were raised in regard to the layoffs on April 18, which I have resolved against Respondent. Here Respondent again had the authority to assign the men to jobs and chose to retain nonunion men in preference to those it knew supported the Union. Respondent's reasons for so acting in the face of a *prima facie* case are not convincing.

In regard to the 8(a)(4) allegations of the complaint, I conclude and find that Respondent discriminatorily laid off employees Donald Cockrum, Albert Wilson, George Smith, and Claude Sanders on April 18, 1968, in violation of Section 8(a)(4) and (1) of the Act, and that since April 18, 1968, Respondent has failed and refused to reemploy Claude Sanders in any manner in violation of Section 8(a)(4) and (1) of the Act, and I am not satisfied that it has fully and adequately reinstated Wilson or Smith. This latter is a question for the compliance stage of this case, but I make no finding that either of them has been adequately reinstated.

The findings of violations of Section 8(a)(1), (3), and

(5) herein are made on the basis that having taken jurisdiction of this case because of the violations of Section 8(a)(4), the Board should exercise its jurisdiction in remedying any and all violations found.

C. The Refusal to Bargain

The events set forth above demonstrate amply that the Union made a demand for recognition backed up by a display of authorization cards on March 19 and requested Respondent to bargain. It is clear that Respondent refused to bargain with the Union, even after seeking and getting confirmation of the Union's majority in an unlawful manner from its employees. I find that the unit composition as of that date consisted of Smith, Wilson, Sanders, Perryman, and the two Cockrums. At the time of the demand Clyde Hunt had not been hired and from the threats made to the employees concerning discharge and the discharges that followed, it is natural to assume that Hune was hired to replace one of the journeymen Scrivener was preparing to discharge. Clearly Statton had not yet been employed. Claybaugh could not come under any definition of a regular employee and neither could Albert Hunt who was probably not employed by Respondent until after the end of the school year and certainly after his father had begun work with Respondent.

Respondent also contends that Scrivener had a legitimate good-faith doubt concerning the validity of the authorization cards shown him by the Union in the morning of March 19. Scrivener testified that on looking at the cards he felt that the writing on several of them looked the same and he doubted their genuineness. Further he stated "I told Mr. Moore that I did not believe those were those boys' signatures. I did not think they had signed those cards or I would have heard something about them signing them." Later in his testimony Scrivener denied that he had raised a question with Moore as to the genuineness of the signatures. When asked what he said to Moore about the cards he answered "I did not say anything about the cards to the best of my knowledge." Scrivener testified once more that he did not say a word to Moore about the genuineness of the cards and said that he did not attempt to find out from the employees whether they signed the cards. He

continued to maintain that his doubt that the Union had a majority, was based on his assessment that the signatures were not genuine.

Bill Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders identified the unambiguous authorization cards and testified they were told that the purpose in signing the cards was to authorize the Union to represent them, and that the cards would be shown to Scrivener as proof of the Union's authority to bargain for the employees and that if he did not recognize the Union the cards could be used for filing a petition for an election. The fifth employee, "Don" Cockrum, testified somewhat differently but finally testified that he was told that the cards would be shown to Scrivener to show that the Union represented the employees. I credit the version of the four men and discredit "Don" Cockrum's contrary testimony.

I conclude and find that March 19 is the appropriate date for determining majority and on that date the Union represented the majority of Respondent's employees in an appropriate unit, made a demand on Respondent for recognition and requested that Respondent enter into collective bargaining with it.

Respondent refused to bargain then or thereafter with the Union and I conclude and find that such a refusal violated Section 8(a)(5) of the Act.⁸ Respondent's claim of a good-faith doubt that the employees had signed the union authorization cards is shown false by the events and testimony including Scrivener's contradiction of himself as to whether or not he raised such a doubt to the union representatives at the time he was shown the cards (I have found that he did not). Moreover if there were ever any such doubt, the employees resolved it for him when he questioned them that morning about their joining the Union. If Scrivener had any doubt as to the validity of the signatures, it was not in good faith but was on the basis that he was surprised that his employees did not tell him about it before signing the authorization cards with the Union, since he thought he had them talked into joining the Union of his choice. Further Scrivener sought to undermine the Union by telling Sanders and others that the Union

⁸ See *Wilmington Heating Service, Inc.*, 173 NLRB No. 15.

said they would replace the men as soon as a contract was signed, seeking to get them to disavow their union allegiance. Scrivener hired Hunt as a replacement for one of the journeymen that day in anticipation of discharging some of the union adherents. Again the fact that the Union represented a majority was clearly demonstrated to Scrivener by the men themselves both on the job site and that evening when in response to his urging they appeared at the shop and were lectured by Respondent's attorney and still maintained their allegiance to the Union demonstrating clearly that the Union represented them.

From the facts and from his testimony Scrivener evidently was disturbed by this turn of events to the point where he raised some question as to whether the men could have meant to do this to him, taking it as a personal affront that they joined the Union.

In these circumstances, I cannot find the Respondent had a good-faith doubt as to the Union's majority but must find that his doubt, if any, was in bad faith and that he acted in bad faith by thereafter attempting to undermine the Union and get the men to reverse their stand by embarking on a campaign of 8(a)(1) and (3) violations.

III. The Effects of the Unfair

Labor Practices Upon Commerce

The activities of Respondent as set forth in Section II, above, and particularly those actions found violative of Section 8(a)(4) of the Act, together with the acts herein found in violation of Section 8(a)(1), (3), and (5) of the Act, occurring in connection with the Respondent's business operations as set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The Remedy

Having found that Respondent engaged in the unfair labor practices set forth above, it is recommended that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act as follows:

Since Respondent on and after March 19, 1968, and at all times since then has refused and still refuses to bargain with the Union as the representative of its employees in an appropriate unit, it is recommended that Respondent, upon request, bargain collectively with the Union and in the event that an understanding is reached, embody such understanding in a signed agreement.

Respondent having discharged Donald Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders on or about April 18, 1968, in violation of Section 8(a)(4) of the Act and Respondent having discharged William Cockrum, Wesley Smith, and Albert Wilson on March 19 and 20 and further having laid off employees William Cockrum and George Smith on March 27, 1968, and not having reinstated employee William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith all in violation of either Section 8(a)(3) or (4) of the Act, I recommend that Respondent offer them immediate and full reinstatement to their former positions or if those positions are unavailable due to a change in Respondent's operations then to a substantially equivalent position without prejudice to their seniority or other rights and privileges. Respondent shall make them whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them by payment to them of a sum equal to that which each would have received as wages from the dates of their discharge or layoffs until the date Respondent reinstates them less any net interim earnings. Backpay is to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, with interest at the rate of 6 percent per annum to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. I further recommend that Respondent make available to the Board, upon request, payroll and other records in order to facilitate checking the amounts of backpay due and the rights of each of these employees.

Respondent has also interfered with its employees' rights by encouraging them to join another labor organization, interrogating them concerning their union activity and their meeting with an agent of the Board, and by threatening them with loss of employment because of their union activity and further threatening to blackball them from other jobs because of their union activity.

Having found that Respondent has broadly disregarded its employees' rights by its refusal to bargain, by its discharges and layoffs, by its violations of Section 8(a)(1), and by its violations of Section 8(a)(4) has violated the basic rights provided by the Act, I am of the opinion that Respondent probably might commit other unfair labor practices unless it is broadly enjoined from so doing. Since part of the purpose of the Act is to prevent the commission of further unfair labor practices, I recommend that Respondent be placed under a broad order to cease and desist from in any other manner infringing upon the rights guaranteed its employees by the Act.

On the basis of the foregoing findings and the entire record in this matter I make the following:

CONCLUSIONS OF LAW

1. Robert Scrivener, d/b/a AA Electric Co. is an employer affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by the Respondent excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since March 18, 1968, the Union has been and now is the exclusive representative of the employees in the said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent, by refusing to bargain with the Union on and after March 19, 1968, as the exclusive representative of its employees in the appropriate unit set forth above, has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

6. Respondent, by discriminatorily laying off or discharging employees Albert Wilson, Donald Cockrum, Claude Sanders, and Wesley Smith on April 18, 1968, and thereafter refusing to reinstate Wilson, Sanders, and Smith because they were interviewed by, and gave testimony to, an agent of the Board conducting an investigation of the

charges in this case, violated Section 8(a)(4) of the Act, and thereby engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(4) and (1) and 2(6) and (7) of the Act.

7. Respondent, by discriminatorily discharging William Cockrum, Wesley Smith, and Albert Wilson on March 19 and 20, 1968, and by discriminatorily laying off employees William Cockrum and Wesley Smith on March 27, 1968, and by refusing thereafter to reemploy William Cockrum all because of the union sentiments, membership, and activities of these employees, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(3) and (1) and 2(6) and (7) of the Act.

8. Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act by: (a) encouraging employees to join a labor organization of Respondent's choice; (b) polling, or causing a poll to be taken of its employees in order to ascertain their union sympathy; (c) interrogating employees concerning their union activity; (d) interrogating employees concerning their meeting with and being interviewed by an agent of the Board; (e) threatening employees with loss of employment on account of their union activity; and (f) threatening employees with blackballing them from other employment because of their union activity.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this case considered as a whole, it is recommended that Robert Scrivener, d/b/a AA Electric Co. of Springfield, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging employees to join a labor organization of Respondent's choosing.

(b) Polling, or causing its employees to be polled, in order to ascertain their union activity.

(c) Interrogating its employees concerning their union activity.

(d) Interrogating employees concerning their meeting with, and being interviewed by, and agent of the Board.

(e) Threatening employees with loss of employment on account of their union activity.

(f) Threatening employees with blackballing them from other employment because of their union activity.

(g) Refusing to bargain collectively in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Local 453, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of the employees in the appropriate unit described in paragraph 3 of the section above entitled "Conclusions of Law."

(h) Discouraging membership in and activities on behalf of Local 453, International Brotherhood of Electrical Workers Union, AFL-CIO, by discriminatorily discharging or laying off and not reinstating its employees.

(i) Discouraging employees from being interviewed by an agent of the Board or cooperating with the Board in its investigation of charges against the employer, by discriminatorily discharging and not reemploying its employees.

(j) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization to form Labor Organizations, to join or assist Local 453, International Brotherhood of Electrical Workers, AFL-CIO, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all the employees in the appropriate unit and embody in a signed agreement any understanding reached.

(b) Offer to William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith reinstatement in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(c) Make Donald Cockrum, William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith whole for any

loss of pay they may have suffered by reason of Respondent's discrimination against them in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, contracts and contract bids, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(e) Notify Donald Cockrum, William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(f) Post at its Springfield, Missouri, shop and office, copies of the attached notice marked "Appendix."⁹ Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 17, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.¹⁰

Dated at Washington, D.C. October 30, 1968.

⁹ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

¹⁰ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

Following a trial in which the Company, the Union, and the General Counsel of the National Labor Relations Board participated and offered their evidence, it has been found that we violated the National Labor Relations Act and we have been ordered to post this notice and to abide by what we say in this notice.

WE WILL NOT ask you what union you want to join nor try to get you to join a union we want.

WE WILL NOT ask you about your union activities.

WE WILL NOT ask you about any meeting you may have with an agent of the National Labor Relations Board.

WE WILL NOT threaten you with loss of your jobs because of your union activities.

WE WILL NOT threaten to blackball you from other work because of your union activities.

WE WILL NOT interfere with your right to file charges against us or be interviewed by or give affidavits to agents of the National Labor Relations Board by laying off or discharging employees because they do so.

WE WILL NOT try to discourage you from becoming or being members of Local 453, International Brotherhood of Electrical Workers, AFL-CIO, by unlawfully firing or laying off any of our employees.

WE WILL bargain collectively, upon request, with Local 453, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached, WE WILL sign a contract containing such understanding. The unit is:

All employees, excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer Donald Cockrum, William Cockrum, Claude Sanders, Wesley Smith, and Albert Wilson their former jobs with all of their rights and any backpay due them.

WE WILL notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

All our employees are free to become or remain union members.

ROBERT SCRIVENER, D/B/A AA
ELECTRIC Co.

.....
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106, Telephone 816—FR4—5181.

EXCEPTIONS OF RESPONDENT TO

TRIAL EXAMINER'S DECISION AND RECOMMENDED ORDER .
Respondent, Robert Scrivener, d/b/a AA Electric Company, hereby filed exceptions to the trial examiner's decision and recommended order dated October 30, 1968, pursuant to Section 10(c) of the National Labor Relations Act, hereafter referred to as the "Act" and Section 102.46 of the Rules and Regulations of the Board, Series 8, as amended.

1. The Trial Examiner erred in making the following specific findings of fact, or conclusions of law, on the ground that such findings are contrary to the greater

weight of the credible evidence, are not supported by substantial evidence viewing the record as a whole, are matters on which the General Counsel failed to sustain his burden of proof, are contrary to the applicable law and policy of the courts and board under the National Labor Relations Act, and are contrary to the rules of evidence and the constitutional rules requiring the respondent to be given a fair hearing attended by due process of law before an impartial hearing officer:

(a) That all parties were afforded an opportunity to participate and cross examine witnesses fully. See Trial Examiner's Decision (hereafter referred to as TXD), Page 2, lines 15-20. The record shows many instances where respondent's right of cross examination and right to introduce evidence in defense to the charges made were improperly and illegally interfered with in such manner as to deny respondent's a fair hearing in violation of due process of law:

(1) The trial examiner's stated attitude at the outset of the hearing that respondent's denials of any testimony accusing him of violating the Act would be discredited if he were specifically asked whether or not he had committed an act as accused by some other witness and if he merely denied that act. (See record of transcript, hereafter referred to as "R", Page 12).

(2) Respondent's objection to G.C. witness, Jack Moore, testifying to hearsay statements made to him by certain of the employees at a meeting in his office, were improperly overruled. (See R, Pages 15-16).

(3) Respondent's objection to participation in the hearing by two attorneys on behalf of the General Counsel and union, without limitation, should have been sustained. (R. 29).

(4) Trial Examiner should have sustained Respondent's objection to the evidence offered by G.C. as to a telephone conversation allegedly between the Respondent and one of the employees, which was not properly authenticated and on which voire dire examination showed that the witness

based the identification of the voice solely upon the name given by the caller. (R 46-47).

(5) Trial Examiner improperly refused to permit Respondent to cross examine witness Wesley Smith about his sporadic work record before any union activity is alleged to have commenced, the trial examiner interrupting the cross examining, and making statements on the record in the presence of witnesses which were prejudicial to Respondent's being accorded a fair and impartial hearing. (R 62-64).

(6) The trial examiner refused to permit full and complete cross examination of witness Wesley Smith (R 67, 69, 70), in connection with the use of an unsigned statement which Respondent's counsel had obtained from Wesley Smith in preparation for the hearing. The trial examiner refused improperly to accept an offer of proof from Respondent that if the witness were permitted to be shown said statement and ask him whether it accurately reflects the full conversation between the witness and Respondent's counsel in preparation for the hearing, that the witness would state that the statement does include such full and complete version of the conversation between him and Respondent's counsel. (R 70, 71, 72).

(7) The trial examiner improperly sustained objection by charging party's attorney which elicited answer on cross examination from witness that Respondent was leaving it to the individual choice of each employee whether or not to join District 50, the trial examiner excluding such cross examination improperly and then concluding in the hearing that Respondent improperly coerced employees to join that union. (R 74-75).

(8) The trial examiner improperly sustained objection to question asked of witness Wesley Smith on cross examination about the absence of threats to discriminate against that witness, after that witness received the letter represented by Respondent's Exhibit 2, the trial examiner thereby interfering with Respondent's right of cross examination. (R 84).

(9) Trial Examiner improperly overruled Respondent's objection to leading questions asked by General Counsel or charging party's attorney to witness Billy Cockrum (R 91) about his alleged "discharge", when Respondent's theory of the case was that there was no discharge of this witness and the trial examiner thereby permitted that witness to have words put in his mouth by his attorney on direct examination over Respondent's objection.

(10) Respondent improperly refused to strike conclusionary statement by witness Albert Wilson that Respondent nodded his head "indicating, I guess, that he was fired," (R 114), although the trial examiner admitted this testimony to be conclusionary.

(11) The trial examiner improperly sustained objection to Respondent's attempted cross examination of witness Albert Wilson, which cross examination, if permitted, would have elicited from said witness this said witness knew of the practice of Local 453, the union, prohibiting its members to work for company's which had not signed a union agreement such as represented by Respondent's exhibit 4 (R 135-137).

(12) Trial Examiner improperly rejected Respondent's offer of proof, after improperly sustaining objections to questions in which Respondent intended to bring out such evidence, that one employee witness had stated to Respondent that he figured the reason that Respondent had not called him back to work after a lay-off was because Respondent knew that this particular employee had another job that was better for him due to his advanced age. (R 152-153)

(13) The trial examiner improperly permitted General Counsel and charging party's counsel to ask leading and suggestive questions and to cross examine their own witness, Donald Cockrum, under the theory that said witness was a hostile witness, when there is no showing in the record that he was a hostile witness, and when the record shows that

the General Counsel's claim of surprise was not a genuine claim. (R 168-195; 198-207).

(14) The trial examiner made statements on the record indicating that he was biased and prejudiced against Respondent in connection with the testimony of General Counsel's witness, Donald Cockrum, and that he was biased and prejudice against said witness, and in favor of a Board investigator who did not testify when the trial examiner expressly accused the said witness of making a serious charge against an investigator for putting down something in a statement from the witness in an improper manner; the trial examiner characterizing this gratuitously as a charge of "deliberate distortion," and accusing the witness of possible perjury in his testimony, when all of these gratuitous statements and remarks of the trial examiner were uncalled for under the circumstances and showed a bias and prejudice in favor of the government investigator who was not present and a claim of infallibility for federal officials generally which demonstrated such bias and prejudice against Respondent, as one who was being charged by a federal government agency, that Respondent was obviously deprived of a fair and impartial hearing before an impartial trial examiner. (R 176-178; 183-184; 195; 211-212, 213, 214, 216).

(15) Trial Examiner improperly refused to permit Respondent to cross examine witness, Donald Cockrum, as to matters to bring out the incorrect implications in the record which the trial examiner had construed as detracting from that witness' credibility in instances where that witness' testimony was helpful to Respondent, by refusing to permit the witness to be rehabilitated by questions concerning the statement he had given to the labor board agent (R 214), and by refusing to permit other questions concerning this witness' work record (R 220-221).

(16) Trial Examiner improperly overruled objection to hearsay testimony of Mr. Griffin which

was offered by General Counsel in effort to prive jurisdiction under interstate commerce requirement when Mr. Griffin obviously testified from what one of his superiors had told him over the telephone when Mr. Griffin was in Springfield and the other person was in Kansas City (R 236).

(17) Trial Examiner erred in refusing to dismiss the entire complaint as being outside the jurisdictional standards of the National Labor Relations Board under the evidence and the General Counsel not having shown any reason why the case should not have been dismissed and there being no evidence which could possibly render this case cognizable under the NLRB's own jurisdictional standards, the trial examiner thereby further demonstrating a bias and prejudice against the Respondent and attempt to coerce and harrass Respondent regardless of the Board's own jurisdictional standards although no theory of coverage cognizable under the board law and precedents were presented to the trial examiner at the hearing and the case should have been dismissed without further delay. (R 246-254).

(18) Trial Examiner improperly overruled Respondent's objections to argumentative questions asked of Respondent on cross examination by the other counsel and questions which called for undue speculation and conjecture in the answers by Respondent. (R 276-277).

(19) Trial Examiner improperly overruled Respondent's objections as to questions in violation of the attorney-client privilege (R 282; R 196).

(20) Trial Examiner improperly overruled Respondent's objections to leading question to witness Edwards as to a purported "sample contract" (R 307).

(21) Trial Examiner improperly refused to permit Respondent to adduce a full record on the picketing activities by the Union which preceded the other events in evidence, improperly sustained objections to said questions and improperly rejected Respondent's offer of proof concerning said

matter, which was a matter that explains some of the other evidence and shows the absence of illegality of Respondent's conduct, when all of the evidence in the record, plus that offered by Respondent but improperly refused by trial examiner, is considered as a whole. (R 311-315)

(22) The trial examiner's decision reveals such a biased and prejudiced view as to the record as a whole as to give further evidence of his lack of impartiality and his biased and prejudice for general counsel and the union against Respondent. (TXD 1-22) Specific references is called to his refusal to follow the Board and Court law regarding interpretation of 8A4 (TXD 3), his gratuitous remarks about the errors in judgment of witness Donald Cockrum, Respondent, and Respondent's counsel in creating a situation which the trial examiner concluded required him to discredit witness Cockrum insofar as that witness' testimony was not adverse to Respondent (TXD 6); the absence throughout the trial examiner's decisions of any citation of Board precedent or authority to justify his conclusions of law as to the various aspects he concluded to be illegal and his defiance of a decision by the Eighth Circuit Court of Appeals which is binding on the trial examiner and on the Board (*NLRB v. Ritchie Manufacturing Company*, 354 F. 2d 90, cited at TXD 15, and the trial examiner's gratuitous references to Respondent's "shifting positions" (TXD 405), and by the trial examiner's complete discrediting of all evidence favorable to Respondent and the complete crediting of all evidence favorable to General Counsel and charging party without any rational basis, and having done so in an arbitrary and capricious manner.

(b) That Respondent had purchased approximately \$18,000.00 worth of materials from Gray-Bar Electric Company in 1968 (TXD 2) when the only evidence to support such finding was hearsay evidence which should have been excluded pursuant to Respondent's objection (R 236).

(c) That the "estimate" of witness Griffin was entitled to credit as a finding of fact where he estimated that 95% of the goods purchased by Respondent came from outside the State of Missouri (TXD 3). Such testimony was objectionable as mere speculation and certainly does not sustain the general counsel's burden of proof on statutory or discretionary jurisdiction. The trial examiner should have found from the testimony of witness Griffin (R 240, 242, 243, 244) that there was insufficient evidence to sustain General Counsel's burden of proof on statutory jurisdiction and that any evidence in the record tending to show any affect upon interstate commerce was no more than diminimus.

(d) That Respondent's claims of violation of equal protection and due process guaranteed under the United States Constitution were without merit. (TXD 3)

(e) That there is a violation of 8A4 and that the Board should assert statutory jurisdiction in this matter. (TXD 3)

(f) That it will effectuate the purposes of the Act for the Board to assert its statutory jurisdiction over this Respondent and that Respondent's activities affect interstate commerce and do have an impact thereon. (TXD 4)

(g) That the date of March 19 is the date for determining the employees included in the bargaining unit, and that the bargaining unit contains the five alleged discriminatees plus Boyd Perryman, and does not include the employees fired in the place of three employees who voluntarily quit their employment on March 20, 1968, which is the demand date which Respondent claims should be used in this case. (TXD 5, 11, 17-18) Trial Examiner improperly overlooks and ignores the credible testimony that Respondent stated to William Cockrum, Smith and Wilson on March 20, that they could work for Respondent if they wanted to, but he did not want them to jeopardize themselves if they had a better offer, he would not hold it against them, and that after this, the men left and this required Respondent to hire two replacements for them after they had voluntarily quit. (R 261-262). The Trial

Examiner completely ignored the admission by General Counsel's witness, William Cockrum, that he was familiar with the union's by-laws and constitution and that the way these rules and regulations are interpreted by Local 453 leads to the result that a member of that union cannot work for a non-union contractor. (R 104)

(h) Trial Examiner erred in crediting the testimony of employees Wilson, Smith, Sanders, and Bill Cockrum, completely and without qualification and in discrediting the testimony of Respondent Robert Scrivener (TXD 5), and in overlooking the many respects which Respondent's testimony which was discredited was in fact admitted by General Counsel's own witnesses or undenied in the record.

(i) Trial Examiner erred in finding that under Board law neither Claybough or Albert Hunt qualify as employees entitled to a voice in determining a bargaining agent and that they were casual employees working only when they felt like it and then only if Respondent had work available; and that Albert Hunt was a summer part-time employee who was disqualified for that reason with no expectation of future employment. (TXD 5) These conclusions are not supported by substantial evidence, are contrary to Board precedent and could best be made by the Board in a representation hearing where all of the testimony could be adduced in a non-adversary proceeding before the Board under the election rules.

(j) The trial examiner erred in determining to credit the testimony of witness, Donald Cockrum, when it is substantiated by his affidavit given to the Board agent, although Donald Cockrum testified that in certain respects the affidavit produced by the General Counsel was inaccurate, and there was no independent testimony by the Board agent who took the affidavit that it was accurate, the testimony of Donald Cockrum standing uncontradicted in regard to the matters which he claimed to be inaccurate in the statement written down in the Board agent's hand and in the Board agent's words. The trial examiner further erred in finding that Cockrum was hired through the intercession of his "in-laws" but there is no evidence to sup-

port that finding, the trial examiner erred in making findings which conclude that it was improper for attorney Jones to have represented Don Cockrum in connection with the criminal prosecution against him which was entirely unrelated from the case before the trial examiner because that Don Cockrum was an alleged SA4 discriminatee, especially in view of the fact that there is no basis whatsoever to sustain an SA4 charge in this case since there has been no testimony given under the Act, and the trial examiner further errs in stating that "attorney Jones drew from Cockrum an agreement that Jones had told Cockrum that the two matters must remain separate and distinct." (TXD 6) The trial examiner further erred in his gratuitous remarks that Cockrum, Respondent and attorney Jones had committed errors of judgment in permitting attorney Jones to represent Don Cockrum in connection with the criminal matter just because of the fact that the unfair labor practice charges were pending. (TXD 6) Trial Examiner further errs in his grossly biased and prejudiced view of the testimony of Donald Cockrum which are not supported by any reasonable construction of the testimony, to the effect that "it became evident to me that Cockrum was seeking to distort and change his testimony to place Respondent's case in a more favorable light." (TXD 6) Trial Examiner further errs in stating that Respondent has no basis for complaint of such credibility resolutions since they result from a situation created by Respondent or Respondent's counsel, this not being a standard of law attended by due process requirements. (TXD 6)

(k) The trial examiner erred in refusing to find that the charging party admitted that it placed a picket on one of Respondent's projects on March 15. (R 310) This was before charging party represented any of Respondent's employees (R 312) This interrupted Respondent's work (R 264) (R 313-315).

(l) Trial examiner erred in finding that Respondent violated the Act by his alleged statements to or interrogation of employees on March 15, 1968, by "broaching" to Smith the proposition that the company's

employees join District 50, (TXD 6) and by having "Smith * * * acting as an agent of Scrivener in conducting this poll of the employees to ascertain their union sympathy." This conclusion is violative of Section 8(c) of the Act and the first amendment of the United States Constitution which guarantee the right of free speech and permitted employer to state a preference or to suggest that employees unionize so long as he does not coerce or intimidate or restrain them and there is no evidence of illegality under the testimony in the record concerning these events. (R 36-37, 74) The trial examiner errs in refusing to credit the testimony of Smith that Respondent was leaving it to the individual choice of each man. (R 74)

(m) Trial Examiner errs in concluding that Bill Cockrum and Scrivener had a telephone conversation on the evening of March 15 concerning Local 453, which is contrary to the evidence. (R 272), and in concluding that Cockrum thereafter called Ray Edwards to request their representation which Edwards agreed to, which is heresay, self-serving testimony and should be entirely disregarded as irrelevant, immaterial and self serving. (TXD 7).

(n) The trial examiner erred in his findings concerning the meeting of March 18 of the employees with the union agents, in refusing to find that the authorization cards signed at that time by the employees were signed under the representation that they were to be used in petitioning for an election, and that they could not be used to sustain an 8A5 charge. (TXD 7) (See R 168)

(o) The trial examiner erred in discrediting the version of Scrivener of the March 18 meeting with Moore and Edwards and in crediting their version and in injecting the trial examiner's own conjectures to the effect that "it would be impossible for the union to organize any company if the employees who sought to be represented would immediately be replaced by other union members upon the signing of a union contract. Such a self-defeating tactic would become known quickly in the trade and would halt any organizational activities the union attempted."

(TXD 8) There is no evidence whatever to sustain these gratuitous remarks of the trial examiner and the trial examiner improperly credited the testimony of the union business agents, whose cross examination showed conclusively that they were attempting to mislead and distort testimony concerning the contracts which they enter into (R 318), and the trial examiner overlooks the fact that the union involved does not have a single contracting employer who has agreed to any agreement different from the standard form agreement given to Respondent to sign and which Respondent testifies he was demanded to sign by 6:00 p.m. (R 319-322)

(p) The trial examiner errs in finding at TXD 9 that the charging party did not make an illegal demand upon Respondent that Respondent either join NECCA or be bound by collective bargaining agreement which had been previously negotiated between the charging party and NECCA, and the trial examiner should have found from the evidence that this was an illegal demand to coerce the Respondent to not have freedom to choose his own bargaining representative as guaranteed by law. (R 258-259)

(q) The trial examiner errs in finding of fact #6 at TXD 9, in that the trial examiner overlooks the testimony which is undisputed that the men would have to pass some certain tests required by the union constitution before they would be permitted to work for the Respondent in the event that Respondent signed a contract with the union (R Exh. 4) From this evidence, it is reasonable to believe Robert Scrivener that Moore made the statement to him that if Scrivener signed a contract with Moore, then Moore would give Scrivener some "good men," who undoubtedly had already passed the test referred to in the evidence.

(r) In making Finding No. 7 at TXD 9, the trial examiner overlooks the important fact of the illegal pickett or the possibly illegal pickett on the job which caused Respondent to be required to seek or think about seeking another contract to finish his job in order to avoid the picketing which was shutting down

the job and interfering with the work progress. (R 310, 312, 313-315, 264)

(s) The trial examiner erred in concluding that Respondent's alleged questioning of employees as to their signing of union cards and threatening that they would lose their jobs as a result of their activity as set forth in Finding No. 6, 7 and 8 at TXT 9, were violative of the act. This finding is contrary to the record and is improper considering the record as a whole. (R 85, 272)

(t) The trial examiner's conclusion at TXD 9-10 that the alleged conversation between Donald Cockrum and Respondent on March 19 violated 8A1 of the Act and the various findings of fact therein contained, are all improper and should be reversed, for the reason that all of this testimony was obviously unbelievable since the General Counsel's witness, Donald Cockrum, was obviously not in agreement with the validity of the affidavits purportedly taken from him by a Board agent and introduced into evidence, and all of this evidence which the trial examiner credited was based upon leading questions and cross examination by the General Counsel of his own witness and by the charging party of its own witness and the findings of the trial examiner in regard to this evidence amounts to a picking and choosing of various pieces of the evidence in an unconnected manner so as to credit the absent Board agent as being a credible witness even though he did not even testify and so as to discredit the General Counsel's own witness, Donald Cockrum, who stated that the affidavits credited by the trial examiner were incorrect.

(u) The trial examiner erred in his finding of Fact No. 10 at TXD 10-11 in attributing certain statements to attorney Jones whereas there was no claim of violation against Respondent by reason of anything attorney Jones stated (R 41-42) and in the fact of the earlier indication by the trial examiner during the hearing that he would not permit an attorney to testify as to any facts that might be in dispute. (R 67-68) That finding should be stricken from the decision entirely in view of the impossibility of Respondent to be af-

forded any opportunity to refute these conclusions of fact and testimony upon which they were based, other than by the fact that the testimony itself is unreliable, and by the fact that as the trial examiner's decision reveals any allegedly illegal statements made by Respondent or his counsel during this brief meeting were quickly corrected and remedied by the offer of Respondent to permit all of the men to come back to work the next day. (TXD 11, lines 10-14)

(y) The trial examiner erred in finding No. 11, at TXD 11, that on March 20 Respondent illegally discharged employees Bill Cockrum, Smith and Wilson, and in making the findings of fact upon which such conclusion was based. The trial examiner overlooks and discredits improperly the testimony of Respondent (R 260 *et seq.*) and of the Board's own witnesses (R 64, 88, 127), which shows that the version of Respondent should be credited and that of the General Counsel discredited and the trial examiner's findings are erroneous for these reasons.

(w) The trial examiner erred in his finding of Fact No. 12 at TXD 11 regarding the alleged telephone call to employee Smith, in that said telephone call was improperly authenticated and should have been excluded, and the *voire dire* examination of the witness indicated that he did not properly identify the caller with sufficient certainty to be admissible in evidence, and the trial examiner further erred in crediting this testimony in the face of his refusal to permit Respondent to cross examine this witness fully on the matters in issue. (R 63, 67-72)

(x) The trial examiner erred in characterizing the letter of Respondent dated March 22, 1968, which was mailed to the three employees who had quit on March 20, 1968, and which did clarify the fact that they had not been discharged and were not being discriminated against and that it would not be held against them if they were advocates of any union, and the trial examiner completely ignored the contents of the letter or scoffed at it in the face of evidence that there was no illegal interrogation, intimidation, threat, coercion or any improper statement by Respondent to any em-

ployee after the date of that letter (TXD 11-12, R 85, 140)

(y) The trial examiner erred in his finding of Fact No. 16 at pages 12-13 of his decision in that he improperly credited the testimony of certain portions of the witnesses of General Counsel and entirely discredited the evidence of Respondent and the portions of the testimony of General Counsel's witnesses which were helpful to Respondent and which discredited General Counsel's case (R 260, 64, 88, 127). The trial examiner overlooked the fact that there was no evidence that Respondent could have had any knowledge of the contents of any statement given by any employees to the Board agent on April 17. (R 84, 88, 141)

(z) The trial examiner erred in making his gratuitous remarks shown at lines 30-45 at Page 13 of his decision, and by drawing on what he calls "common sense" and then by making preposterous conclusions under that name, and by concluding that Respondent improperly questioned employees Wilson and Saunders on April 18 concerning their meeting with the Board Field examiner in violation of 8A1 of the Act. These findings and conclusions of the trial examiner are not based upon any evidence in the record, are based upon mere conjecture and speculation and are in fact contrary to applicable Board precedent and are such gross distortions of the evidence as to constitute a denial to Respondent of a fair hearing attended by due process of law.

2. Respondent excepts to the findings and conclusions of the trial examiner that the lay-offs of employees on April 18, 1968, and at subsequent times, were unlawful and discriminatory (TXD 13-17), and Respondent specifically takes exception to the following subsidiary findings of fact in connection therewith:

(a) That the lay-offs of Don Cockrum, Wilson, Smith and Saunders on April 18 were discriminatory and the failure to recall Bill Cockrum is discriminatory (TXD 13-17).

(b) That Scrivener's explanation as to why these men were laid off was not convincing (TXD 14). This

is a shifting of the burden of proof to the defendant which is illegal.

(c) That Scrivener was not using good business judgment in laying off men that the trial examiner deemed to have seniority over men that were kept, and specifically the finding that "Further, the fact that a man had started a particular job would not seem to make any difference since the men would be following wiring diagrams in wiring a house or apartment and in any event a journeyman electrician should be capable of picking up a job at any point from any other journeyman," and the finding that since men had been switched when Wilson was ill on April 1 that somehow this was evidence that Scrivener should have made lay-offs on a different manner than he did subsequently or prior to that time, and that it would have been to Scrivener's benefit to retain more experienced helpers, and that Scrivener's explanations were not convincing enough to overcome the *prima facie* case presented by the General Counsel (TXD 14) All of these findings are contrary to the evidence, shift the burden of proof to the Respondent from its proper place on the General Counsel, are contrary to law, and constitute an arbitrary decision by the trial examiner to substitute his business judgment from that which Respondent is entitled to exercise.

(d) That "Here a new event occurs, the Board Field Examiner is investigating the charge and even after the harsh discipline of discharge for daring to want a union of their choice, the men go to the union hall and discuss Scrivener's actions relating to the charge in interviews with the Board Field Examiner. Scrivener, knowing of his employees' meeting with the Board Field Examiner and being aware of the advice that he was not subject to the board jurisdiction, summarily laid off the remaining four employees in a rather evident attempt to demonstrate that he controlled their working conditions and to punish them for having the temerity to meet with and give evidence to the Board Field Examiner." (TXD 14, lines 34-46) This finding amounts to a pure speculative conjecture by a biased trial examiner, not based upon any substantial evidence in the record.

(e) That the circumstantial evidence of the lay-off of April 18 is sufficient to support a finding that that lay-off was in retaliation against the employees in connection with their talking to the Board agent, and all of the findings in connection with that finding at TXD 14-15. These are not supported by any substantial evidence in the record as a whole, are contrary to the credible evidence, and amount to shifting the burden of proof to the respondent.

(f) That the lay-offs of April 18 violated Section 8A4 of the Act, even though there had been no testimony presented by any employees prior to the lay-off before an NLRB hearing or any type of hearing at which the Respondent was present (TXD 15-17). This is contrary to applicable Board precedent and the applicable court decisions construing the Act, and the finding of discrimination under 8A4 is not supported by any substantial evidence in the record as a whole, particularly there is lacking any evidence that Respondent knew about any particulars regarding any meeting with the Board agent by any of the employees, and there is no evidence that he knew whether they were cooperative or uncooperative, whether they went voluntarily or involuntarily to talk to the Board agent, and very little evidence that he had any knowledge that they even talked to the Board agent.

(g) That the union filed the charge as the authorized agent of the employees alleged to be discriminated against and that this was the same as if they had filed it in their own names. (TXD 15-16) There is no support in the record to show any such authorization and this amounts to pure speculation and conjecture by the trial examiner and is contrary to applicable Board precedent and statutory law as well as common law.

(h) All of the findings concerning the alleged violation by Respondent of Section 8A4 of the Act, at TXD 15-17, on the ground that there is no support in the record for these findings, the speculation and conjecture of the trial examiner to facts he assumes without any evidence in the record, is improper, the interpretation of the trial examiner of Section 8A4 is improper as applied to the evidence in the record as a whole and

is contrary to applicable Board and court decisions and to the statute itself.

(i) That Wilson did not voluntarily quit on May 10, 1968, and that he had not been adequately reinstated prior to that date (TXD 16). This is contrary to the evidence, not supported by substantial evidence on the record as a whole, and contrary to applicable and Board and court precedent.

(j) That Respondent had demonstrated union animus (TXD 16).

(k) That there "might be a question as to whether Respondent manipulated its work in order to have an apparent reason for laying off employees, and that Respondent was able by adjusting its bids on available work to either try to get it or not and that he apparently sought to subcontract the work he had on the apartment house to Aton Luce Company (TXD 16). These findings have no merit in the record and no relevance to this case and there is no evidence that Respondent deliberately manipulated his work to discriminate against employees.

(l) That Respondent violated Section 8A3 in connection with Bill Cockrum, George Smith in failing to recall them after having discriminatorily laid them off. And apparently in allegedly adjusting his work to that he would not have any need to recall them, and particularly we expect to the trial examiner's shifting of the burden of proof to the Respondent in regard to these matters. (TXD 17) These findings are not supported by any substantial evidence on the record as a whole, are contrary to applicable Board and court precedent, and contrary to law.

(m) That Respondent violated Sections 8A4, and (1), and 8A1 and 3 and 5. (TXD 17) These findings are not supported by any substantial evidence on the record as a whole, are contrary to applicable court and Board precedent.

3. Respondent excepts to the trial examiner's findings and conclusions regarding the alleged refusal to bargain by the Respondent and the finding and conclusion that Respondent violated Section 8A5 of the Act and other sections of the Act in connection therewith, on the ground

that said findings and conclusions are not supported by any substantial evidence on the record as a whole, are contrary to applicable Board and court precedent, and contrary to law, and that the trial examiner failed to consider relevant and material evidence in Respondent's favor when making the findings he has made in regard to these matters. (TXD 17-18) Respondent specifically excepts to the following findings in regard to the above:

(a) That the facts demonstrate amply that the union made a demand for recognition backed up by a display of authorization cards on March 19, and requested Respondent to bargain, and that Respondent refused to bargain with the union even after getting confirmation of the union's majority in an unlawful manner from its employees (TXD 17).

(b) That the unit composition as of March 19 consisted of Smith, Wilson, Saunders, Perryman, and the two Cockrums, and that this is the appropriate unit for bargaining. (TXD 17-18)

(c) That employees, Clyde Hunt and Richard Claybaugh, were not appropriately in the bargaining unit. (TXD 17-18)

(d) That Respondent did not have a legitimate good faith in doubt concerning the validity of authorization cards shown him by the union on March 19, and that Scrivener's testimony was inconsistent on whether he expressed a doubt to the union in regard to the genuineness of the authorization cards (TXD 17).

(e) That Bill Cockrum, Albert Wilson and Wesley Smith and Claude Saunders testify that they were told that the purpose in signing the cards was to authorize the union to represent them (TXD 18).

(f) That Don Cockrum's testimony did not show that the cards were represented by the union to the employees as being needed in order to obtain an NLRB election and the trial examiner's failure to find that there was at least ambiguity in the explanation given by the union agents to the employees when they signed the cards and that there was no clear understanding by the employees that the cards were anything other than an election petition (TXD 18).

(g) That March 19 was the appropriate date for

determining majority and that the union represented a majority of the employees at that time and made a demand for recognition to enter into collective bargaining with the union, and that Respondent refused to bargain then or thereafter with the union in violation of Section 8A5 of the Act (TXD 18).

(h) That Respondent's claim of good faith in doubt that the employees had signed the cards is shown false by the events and testimony including Scrivener's contradiction of himself as to whether or not he raised such a doubt to the union representative at the time he was shown the card (TXD 18). This is contrary to the General Counsel's own witnesses (R 20, 21-22).

(i) That any doubts Scrivener had about the cards was not a good faith doubt, and that Scrivener sought to undermine the union by telling Saunders and others that the union said they would replace the men as soon as the contract was signed, the trial examiner apparently concluding that the statement by Scrivener was false, when there is no evidence to justify that conclusion. (TXD 18).

(j) That Scrivener hired Hunt in anticipation of discharging some of the union adherents. (TXD 18).

(k) That the employees of Respondent were lectured by Respondent's attorney (TXD 18).

(l) That the employees clearly demonstrated to Respondent that the union represented them. (TXD 18). That Respondent took it as a personal affront that his men had joined the union. (TXD 18).

(m) That the Respondent did not have a good faith doubt as to the union majority but had a bad faith and acted in bad faith by attempting to undermine the union and get the men to reverse their stand by embarking on a campaign of 8A1 and 8A3 violations. (TXD 18).

4. Respondent excepts to the trial examiner's findings that the actions he found in regard to his alleged claim that Respondent violated Sections 8A4 of the Act, and 8A1, (3), and (5) of the Act, occurring in connection with Respondent's business operations, had a close, intimate and substantial relation on trade, traffic and commerce among the several states and tended to lead to labor dis-

putes burdening and obstructing commerce and the free flow of commerce. (TXD 19) There is no substantial evidence on the record as a whole to support these findings; these findings are contrary to applicable Board and court precedent and contrary to law.

5. Respondent objects to the remedy proposed and the recommended order of the trial examiner (TXD 19-22 on the ground that said proposed remedies are improper because the findings and conclusions on which they are based are improper; that even if there were any violations, the remedies are duly burdensome and broad and are not remedies which would effectuate the purposes of the act under this case, and on the ground that the Board does not have any statutory jurisdiction, and this Respondent's business is not shown by the evidence to come within the Board's published Board standards of jurisdiction, and it is a denial of equal protection of the law and due process of law to assert jurisdiction in this case and to impose the recommended remedies and orders upon Respondent.

6. The trial examiner erred in finding that Respondent is subject, under the evidence presented, to the statutory jurisdiction of the National Labor Relations Board (TXD 3, line 17-22) (R 231, 242-243). He should have found that General Counsel failed to sustain his burden of proof on issue of statutory jurisdiction and that any inference from the record show that there has been no showing of any affect upon interstate commerce by Respondent's business that is anything other than merely diminimous, and that the complaint should have been dismissed for lack of statutory jurisdiction.

7. The trial examiner erred in finding and concluding that the Board should exercise discretionary jurisdiction over all, or any part of, the matters contained in the complaint herein, since it is admitted by the trial examiner and all parties concerned that Respondent's business does not come within the jurisdictional standards published by the National Labor Relations Board. (TXD 3, lines 17-53, TXD 4, lines 1-4). Such finding and conclusion is contrary to Board law and policy and the Board's own jurisdictional standards. In the circumstances of this case, such finding and conclusion results in a denial of due process of law and equal protection of the laws to Respondent, con-

trary to the guarantees of the United States Constitution. The trial examiner subjects Respondent to a refusal to bargain charge, based upon a showing of authorization cards, when it is admitted that the NLRB election processes for testing that showing of interest are not available to Respondent, because he does not meet the published jurisdictional standards of the Board. Respondent has been told by the trial examiner's decision that he must obey the portions of the law directed against Respondent, while at the same time the portions of the law which qualify his obligations thereunder, the provisions permitting him to file for an election before he is compelled to bargain with a union claiming majority status, are made inapplicable to him by the Board's jurisdictional standards. The trial examiner should have concluded that since Respondent was not shown to meet the Board's jurisdictional standards, the entire complaint should have been dismissed.

8. The trial examiner erred in finding and concluding that Respondent violated Section 8(a)(4), and that this theory of violation provides justification for the Board to assert jurisdiction here (TXD 13-17). This amounts to the trial examiner's acceptance of a theory of violation, which is a mere pretext and for which there is no statutory, board or court precedent, merely for the purpose of providing an excuse for the Board to assert jurisdiction in a case against Respondent which does not come under the published standards of the Board for asserting jurisdiction. Even if Section 8(a)(4) were to be construed in such manner as the trial examiner desires, it would be improper and a denial of due process of law to apply it in this newly construed manner against the Respondent. The trial examiner is permitting the Respondent to become trapped by finding him in violation of a law which had never been previously construed in the manner suggested by the Trial examiner, and if the Board and court are to construe such an 8(a)(4) as suggested by the trial examiner in the future, still it is improper to so construe it as to the Respondent.

9. The trial examiner erred in forcing the Respondent to a full scale hearing on all of the facts and matters contained in the complaint, when it was clear at the outset of the hearing that there was a serious question of Board jurisdiction, either statutory or discretionary, and it was a

denial of due process and a denial of a fair hearing to the Respondent to be forced to defend himself against charges when the jurisdiction of the Board was lacking and seriously doubtful, and then to use the evidence adduced in such hearing in order to provide and attempt to assert jurisdiction against him. The hearing was used as a fishing expedition in an attempt to find bits and pieces of evidence upon which the trial examiner could seize to assert jurisdiction when jurisdiction was entirely lacking. The trial examiner should have held a hearing on the jurisdictional issue alone before hearing any of the other evidence. When Respondent raised the jurisdictional question to the Regional Director's office, the investigation should have been restricted to the jurisdictional question alone. Instead, the Regional Director was permitted to undertake further investigation by talking to employees and then to use that as a trumped-up charge against Respondent for discrimination against the employees for talking to the Board agent, at a time when the Board agent had no statutory authority and no authority under applicable Board policy to investigate further than the jurisdictional question. All of this has resulted in a denial of due process to the Respondent, and a denial of equal protection of the law, and amounts to an arbitrary application of the National Labor Relations Act to prosecute a small businessman while at the same time the provisions of the statute enacted by Congress for his protection have been denied him.

10. The trial examiner erred in refusing to dismiss the complaint on the ground that it was issued in violation of Section 10(b), since the complaint was not reasonably related to the original charge filed herein, and that complaint obviously was based on a charge which was illegally initiated by a Board agent.

For all of the foregoing reasons the trial examiner's decision is excepted to, and in regard to each of the exceptions Respondent contends that there is no substantial evidence on the record as a whole to support the trial examiner's findings and conclusions, and such findings and conclusions are contrary to applicable Board and court authority and contrary to law.

WHEREFORE, Respondent respectfully requests the Board to reverse the trial examiner's decision, deny adop-

tion of any part of his recommended order, and issue an order dismissing the complaint in its entirety.

Respectfully Submitted,

CHURCH, PREWITT, JONES,
WILSON & KARCHMER

/s/ Donald W. Jones

110 Landmark Building.
Springfield, Missouri
Attorneys for Respondent

[CERTIFICATE OF SERVICE]

DECISION AND ORDER

On October 30, 1968, Trial Examiner John M. Dyer issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel and the Charging Party filed briefs in support of the Decision. The Charging Party also filed a brief in response to the Respondent's exceptions to the Trial Examiner's Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner insofar as they are consistent herewith.

We find, in agreement with the Trial Examiner, that Respondent's operations have an impact on and affect interstate commerce within the meaning of Section 2(6) and (7) of the Act, and therefore fall within the statutory

jurisdiction of the Board.¹ We also find, in partial agreement with the Trial Examiner, that although Respondent's operations do not meet the Board's discretionary jurisdictional standards,² it will effectuate the policies of the Act for the Board to assert jurisdiction in the present circumstances, but only to the extent and for the reasons set forth below.

As found by the Trial Examiner and established by the record, the Respondent on April 18, 1968, discharged employees Wilson, Sanders, Smith, and Don Cockrum in retaliation against them for having met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against Respondent. We agree that said discharges interfered with the Board's investigation of those charges. The investigation of charges filed is an integral and essential stage of Board proceedings.³ It is clear that Respondent's conduct falls within the prohibitions of Section 8(a)(1)⁴ and (4)⁵ of the

¹ The branch manager of the Graybar Electric Company facility with which Respondent does business in Springfield, Missouri, George A. Griffin, testified that he had examined the records of Graybar at Springfield, and that his examination revealed that Respondent had purchased approximately \$4,769.33 worth of goods and materials from Graybar during the period of March 21 until May 9, 1968, and that this estimate was that approximately 90 percent thereof originated outside the State of Missouri. Griffin's testimony as to his examination of records and as to his estimate of interstate purchase is admissible and competent as evidence of impact on commerce within the meaning of Section 2(6) and (7) of the Act. *N.L.R.B. v. Jones Lumber Co.*, 245 F.2d 388 (C.A. 9); *N.L.R.B. v. Operating Engineers*, 243 F.2d 134 (C.A. 9); *Amalgamated Meat Cutters and Butcher Workmen of North America (The Great Atlantic and Pacific Tea Company)* (81 NLRB 1052, at footnote 1.

² *Siemons Mailing Service*, 122 NLRB 81.

³ See Section 101.4 of the National Labor Relations Board Statements of Procedure, Series 8, as amended; which provides that as a part of the investigation of unfair labor practice charges a member of the field staff shall interview representatives of the parties and other persons having knowledge as to the charges. Cf. *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301, at 308 where the Supreme Court stated that "(o)nce its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it.

⁴ Cf. *Electro Motive Manufacturing Co.*, 158 NLRB 534; *Southland Paint Co.*, 156 NLRB 22; *Grand Central Chrysler, Inc.*, 155 NLRB 185; *A & P Import Co.*, 154 NLRB 938.

⁵ Cf. *Hoover Design Corporation*, 167 NLRB No. 62, reversed in part 402 F.2d 987 (C.A. 6); *Manila Manufacturing Company*, 171 NLRB No. 151.

Act. These sections are designed, at least in part, to safeguard the procedure established for the vindication of Section 7 rights by assuring protection against employer retaliation to those who participate therein. As the Supreme Court has stated, Congress intended that "... all persons with information about unfair labor practices are to be completely free from coercion against reporting them to the Board."⁶ In these circumstances, public policy requires the Board to assert jurisdiction for the purpose of remedying the Respondent's unlawful interference with the statutory right of all employees freely to resort to and participate in the Board's processes.⁷

We find, however, contrary to the Trial Examiner, that it will not effectuate the policies of the Act for the Board to assert jurisdiction herein over the alleged independent and unrelated violations of Section 8(a)(1), (3), and (5) of the Act. Although the statute imposes no restrictions on the Board's power to exercise jurisdiction over activities affecting commerce,⁸ the Board early adopted the position that it could better effectuate the purposes of the Act if it did not exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress. Consistent with that view, and as the result of experience in the administration of the Act, the Board decided to limit its exercise of jurisdiction to enterprises whose operations had a pronounced impact upon the flow of interstate commerce. The Board's self-imposed jurisdictional standards establish the guidelines by which the Board normally assesses such impact. Adhering to the standards in all but exceptional situations such as that discussed above⁹ insures the uniform administration of national labor relations policy and enables the Board to concentrate its resources on resolving labor disputes having substantial impact on commerce.¹⁰ This case would have been dismissed entirely.

⁶ *Nash v. Florida Industrial Comm'n.*, 389 U.S. 235, 238.

⁷ *Pedersen v. N.L.R.B.*, 234 F.2d 417 (C.A. 2); *Philadelphia Moving Picture Machine Operators' Union, Local No. 307*, 159 NLRB 1614.

⁸ *N.L.R.B. v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675.

⁹ Compare, also, the Board policy of asserting jurisdiction over all employers whose operations have a "substantial" impact on national defense. *Ready Mix Concrete & Materials, Inc.*, 122 NLRB 318.

¹⁰ See *Siemons Mailing Service*, *supra*.

on jurisdictional grounds had the Respondent not interfered with its employees' right to resort to the Board's processes. The reason is that, unlike remedying the violations of Section 8(a)(4), the remedying of the alleged violations of Section 8(a)(1), (3), and (5) has no immediate impact on the vindication of the right of an individual to resort to the Board's processes and thus provides no independent basis for asserting jurisdiction. In these circumstances; we find that equal and effective administration of the policies of the Act require us to limit our exercise of jurisdiction to remedying the Section 8(a)(4) violations.

Accordingly, we shall dismiss those portions of the complaint alleging independent and unrelated violations of Section 8(a)(1), (3), and (5) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Robert Scrivener, d/b/a A A Electric Co., Springfield, Missouri, his agents, successors, and assigns, shall:

1. Cease and desist from interfering with his employees' right to be interviewed by an agent of the Board and to cooperate with the Board in its investigation of charges by laying off or discharging his employees for exercising such right.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

- (a) Offer to Don Cockrum, Albert Wilson, Wesley Smith, and Claude Saunders reinstatement in accordance with the recommendations set forth in that section of the Trial Examiner's Decision entitled "The Remedy," insofar as those recommendations relate to the discharge of the above employees occurring on April 18, 1968.

- (b) Make Don Cockrum, Albert Wilson, Wesley Smith, and Claude Saunders whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them in accordance with the recommendations set forth in that section of the Trial Examiner's Decision entitled "The Remedy," insofar as those recommendations

relate to the discharge of the above employees occurring on April 18, 1968.

(c) Notify Don Cockrum, Albert Wilson, Wesley Smith, and Claude Saunders if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, contracts and contract bids, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at his Springfield, Missouri, shop and office, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by his representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what step respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to any unfair labor practices alleged but not herein found.

Dated, Washington, D. C. June 30, 1969.

FRANK W. McCULLOCH, *Chairman*

HOWARD JENKINS, JR., *Member*

SAM ZAGORIA, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member Fanning, concurring in part and dissenting in part:

I agree with the majority's decision in asserting jurisdiction for the purpose of remedying Respondent's unlawful discharge of those employees who utilized the Board's processes. However, I dissent from my colleagues' refusal to extend the protection of the Act to also remedy the violations of 8(a)(1), (3), and (5) of the Act as found by the Trial Examiner. Once the Board asserts jurisdiction, public policy requires the fullest exercise thereof in order to protect employees from any conduct which is unlawful under the Act. See *Philadelphia Moving Picture Machine Operators' Union*, 159 NLRB 1614, footnote 3. I would therefore affirm the Trial Examiner's Decision in full.
June 30, 1969

JOHN H. FANNING, *Member*
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT interfere with your right to be interviewed by or give statements or affidavits to agents of the National Labor Relations Board by laying off or discharging you because you do so.

WE WILL offer Donald Cockrum, Albert Wilson, Wesley Smith, and Claude Saunders their former jobs with all of their rights and any backpay due them.

WE WILL notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act, as amended, after discharge from the Armed Forces.

ROBERT SCRIVENER, d/b/a
A A ELECTRIC Co.

(Employer)

Dated _____ By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East Twelfth Street, Kansas City, Missouri 64106, Telephone 816-374-5181.

**RESPONDENT'S MOTION TO RECONSIDER BOARD'S DECISION
AND ORDER**

Pursuant to Rule 102.48(d), Respondent moves the Board to reconsider its decision herein under date of June 30, 1969, in the following respects:

1. The Board should find that statutory jurisdiction does not exist, for the reasons stated at pages 3-5 of Respondents Brief to the Board dated December 4, 1968.

2. The Board should find that there is no evidence to support a finding that Respondent violated Section 8(a)(4) of the National Labor Relations Act, as amended, hereafter called the Act, for the reasons set forth at pages 8-13 of Respondent's Brief to the Board dated December 4, 1968. The evidence on this point is not discussed by the Board's Decision dated June 30, 1969, but rather such decision appears to *assume* that the Trial Examiner's findings in this regard are supported by evidence. The Board should closely examine the evidence on this point, and the applicable law as set forth in *Ogle Protective Service*, 149 NLRB 545, at page 566, 57 LRRM 1337 (1964) and *NLRB v. Ritchie Manufacturing Co.*, 354 F.2d 90, 61 LRRM 2013, 61 LRM 2160 (8th Cir. 1966), discussed at pages 8-9 of Respondent's Brief to the Board dated December 4, 1968, and at pages 11-12 of Respondent's Brief to the Trial Examiner. See also *Hoover Design Corp. v. N.L.R.B.*, 402 F.2d 987, 69 LRRM 2649 (6th Cir. 1968), which expressly follows the *Ritchie Manufacturing Co.* decision of the Eighth Circuit.

3. The Board should dismiss the entire complaint because of the entrapment practiced upon Respondent by the Regional Director, and because the charge under Section 8(a)(4) was obviously initiated by a Board agent in violation of Section 10(b) of the Act, for the purpose of urging the Board to take jurisdiction of this case where the jurisdictional standards published by the Board concededly are not met. Such practice deprives Respondent of due process of law and results in official oppression against a small employer, an attempt to coerce him by litigation instituted without jurisdiction resulting in Respondent's being required to defend proceedings on which jurisdiction never should have been sought to be asserted. Such is not the sort of tactics which this Board should countenance.

For these reasons, and all of the reasons previously as-

serted by Respondent in the Briefs previously filed by him with the Board and the Trial Examiner, Respondent urges the Board to reconsider the evidence relating to statutory jurisdiction, relating to the claimed violations of Section 8(a)(4) and Section 10(b). Such review, Respondent believes, would result in a modification of the Board's order herein, totally dismissing the complaint herein as not coming within the Board's statutory or discretionary jurisdiction, and as not being based upon any substantial evidence in the record as a whole proving any violation of the Act by Respondent.

Since the Charging Party has filed a motion for reconsideration herein, relating to the Board's order dismissing the claimed violations of Section 8(a)(1), (3) and (5), Respondent urges, that in the event such motion be granted, the Board also reconsider all of Respondent's contents in regard to those alleged violations, as asserted in Respondent's earlier brief to the Board in support of exceptions to Trial Examiner's Decision.

Respectfully submitted,

CHURCH, PREWITT, JONES, WILSON &
KARCHMER

/s/ Donald W. Jones
110 Landmark Building, P.O.
Box 1446 S.S.S.
Springfield, Missouri 65806
Phone (417) 862-9255

Attorneys for Respondent

[CERTIFICATE OF SERVICE]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,305

*NATIONAL LABOR RELATIONS BOARD, PETITIONER.

v.

ROBERT SCRIVENER, d/b/a A A ELECTRIC COMPANY,
RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD.

[January 6, 1971.]

Before MEHAFFY and HEANEY, Circuit Judges, and MERE-
DITH, District Judge.

PER CURIAM.

The National Labor Relations Board petitions this Court for enforcement of an order against Robert Scrivener, d/b/a A A Electric Company. The Board's decision is reported at 177 N.L.R.B. No. 65, 71 L.R.R.M. 1595 (1969).

The Board found that the Company violated Sections 8(a)(4) and (1) of the National Labor Relations Act by discharging three employees for having met, and having given a written sworn statement to, a Board field examiner investigating unfair labor practice charges filed against Scrivener. The Board dismissed other charges alleging that Scrivener had violated Sections 8(a)(1), (3) and (5) of the Act, giving as a reason that Scrivener's operation did not meet the Board's discretionary jurisdictional standards.

The principal question raised on this appeal is whether Section 8(a)(4) of the Act, which makes it an unfair labor practice for an employer "to discharge . . . an employee because he has filed charges or given testimony under this

Act," is to be construed to encompass discharge of employees for giving written sworn statements to Board field examiners. This Court stated in *N.L.R.B. v. Ritchie Mfg. Co.*, 354 F.2d 90 (8th Cir. 1966), that "We are reluctant to hold that § 8(a)(4) can be extended to cover preliminary preparations for giving testimony." This reluctance continues. We are particularly hesitant to overrule or distinguish *Ritchie* in a case where the Board's jurisdiction to act is marginal. Compare, *Hoover Design Corporation v. N.L.R.B.*, 402 F. 2d 987 (6th Cir. 1968); *King Radio Corp. v. N.L.R.B.*, 398 F. 2d 14 (10th Cir. 1968); *Oil City Brass Works v. N.L.R.B.*, 357 F. 2d 466 (5th Cir. 1966).

The National Labor Relations Board suggests that if we are unwilling to overrule or distinguish *Ritchie*, we can accomplish the same result by upholding the Board's finding that the discharges complained of violated Section 8(a)(1) as well as Section 8(a)(4) of the Act. We are unwilling to take this course. To do so would be to overrule *Ritchie* implicitly, and we are not prepared to take that action.

We decline to enforce the order of the Board.

A true copy.

★ Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1970**

No. 20305

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

vs.

**ROBERT SCRIVENER, d/b/a AA ELECTRIC COMPANY,
RESPONDENT.**

**APPLICATION [FOR ENFORCEMENT] OF AN ORDER OF
NATIONAL LABOR RELATIONS BOARD.**

This cause came on to be heard on the Application for Enforcement of Order of the National Labor Relations Board dated May 20, 1970, (Case No. 17-CA-3519), and on the Answer of Respondent to the Application for Enforcement, and the appendix and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the Application for Enforcement of Order of the National Labor Relations Board in this cause, be, and is hereby, denied, in accordance with opinion of this Court this day filed herein.

January 6, 1971

Costs taxed in favor of the Respondent:—

Cost of 25 copies of Brief of Respondent— **\$259.20**

Total taxable costs of Respondent **\$259.20**
for recovery from Petitioner, National
Labor Relations Board.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

ROBERT C. TUCKER

by W. F. GRUENINGER

Chief Deputy

May 3, 1971

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1970

No. 20305

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

vs.

ROBERT SCRIVENER, d/b/a A A ELECTRIC Co.,
RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF ORDER OF THE
NATIONAL LABOR RELATIONS BOARD.

The Court having considered petition for rehearing en banc filed by counsel for petitioner and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

February 26, 1971

In the Supreme Court of the United States

No. 70-267

**NATIONAL LABOR RELATIONS BOARD,
PETITIONER,**

v.

ROBERT SCRIVENER, DBA AA ELECTRIC COMPANY

ORDER ALLOWING CERTIORARI. Filed October 12, 1971.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBERT SCRIVENER, d/b/a AA ELECTRIC COMPANY

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 14-15) is reported at 435 F. 2d 1296. The decision and order of the Board are reported at 177 NLRB No. 65 (App. D, *infra*, pp. 19-73).

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 16-17) was entered on January 6, 1971,

and the Board's timely petition for rehearing *en banc* was denied on February 26, 1971 (App. C, *infra*, p. 18). On May 19, 1971, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer's discharge of an employee because he has given a written statement to a Board agent during the investigation of an unfair labor practice charge violates Section 8(a)(1) and (4) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act * * *.

STATEMENT

Respondent (the Company) is an electrical contractor engaged in residential and commercial construction in Springfield, Missouri (App. D, pp. 31, 34-35; A. 151-152, 12).¹ On March 18, 1968, a majority of the Company's employees signed cards authorizing Local 453, International Brotherhood of Electrical Workers, AFL-CIO (the Union) to represent them for collective bargaining (App. D, pp. 41-42, 61-62; A. 7-9, 58, 68, 89, 97).² The following day, Union representative Moore advised Company President Scrivener of the Union's majority status and asked to negotiate a contract (App. D, pp. 42-43; A. 10). After examining the cards, Scrivener refused (App. D, pp. 43, 61-64; A. 10-11).

Scrivener then visited his several jobsites, complained to the employees of their activities, and at one point threatened to discharge employees who continued to support the Union (App. D, pp. 44-48; A. 69, 9). On March 20, he dismissed card signers Bill Cockrum, Smith, and Wilson when they affirmed their affiliation with the Union (App. D, p. 49; A. 60-61, 25, 72). The next day the Union filed charges with the Board, alleging that the Company had violated Section 8(a)(1), (3), and (5) of the Act (App. D, p. 50). On March 26, Scrivener per-

¹ "A." refers to the portion of the record printed as an appendix to the briefs in the court of appeals.

² The bargaining unit consisted of six employees. Five of them—Bill and Don Cockrum, Smith, Wilson, and Sanders—signed authorization cards. App. D, pp. 41-42, 61-62.

mitted the three discharges to return to work, but the following day he again released Bill Cockrum and Smith. While the reason given was lack of work, several junior employees, who had not signed cards, were retained (App. D, p. 51; A. 29, 30, 60, 72-73, 217). Smith was recalled on April 1 and, along with the other card signers except Bill Cockrum, continued to work until April 18 (App. D, pp. 51, 53-54).

viewed — On April 17, a field examiner from the Board's Regional office interviewed the five card signers—Bill and Don Cockrum, Smith, Sanders, and Wilson—in connection with the charges filed on March 21. Four of them gave sworn statements to the examiner (App. D, p. 51; A. 30-31, 73-74, 91, 101). The next morning Scrivener questioned several of the men about their interviews with the examiner, and after work that day, dismissed the four card signers still working for him with the explanation that there was no work for them (App. D, pp. 51-54; A. 30-31, 74-75, 92, 110-111).³

The Board found that the Company's operations, while too small to satisfy the Board's self-imposed jurisdiction standard,⁴ were sufficiently extensive to

³ Three junior employees, who had not signed cards, continued to work. According to credited testimony, the Company had at this time substantial work to complete in at least three houses and a nine-unit apartment dwelling (App. D, pp. 53-54, 59; A. 32-33, 111-112, 213, 214).

⁴ The Board's standard requires that an employer have a direct flow of goods in interstate commerce of at least \$50,000 a year. *Siemons Mailing Service*, 122 NLRB 81. Though the Company did not meet that standard, it did substantial inter-

"have an impact on and affect interstate commerce" and thus were, "within the statutory jurisdiction of the Board" (App. D, p. 20). It concluded that the April 18 discharges of employees Don Cockrum, Smith, Wilson, and Sanders were "in retaliation against them for having met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against the [Company]" (App. D, pp. 20-21); and that this interference with its investigation—"an integral and essential stage of Board proceedings"—violated Sections 8(a)(1) and (4) of the Act (App. D, p. 21). "In these circumstances, public policy requires the Board to assert jurisdiction for the purpose of remedying the [Company's] unlawful interference with the statutory right of all employees freely to resort to and participate in the Board's processes" (App. D, pp. 21-22). Accordingly, the Board ordered the Company to cease and desist from the Section 8(a)(1) and (4) unfair practices, to reinstate the dischargees with back pay, and to post the usual notices (App. D, pp. 23-25).*

state business. During the previous year (1967), it purchased more than \$23,000 of materials from just one of its suppliers, about 90 percent of which originated from outside the State of Missouri; for 1968, its projected purchases of interstate goods from this supplier exceeded \$30,000 (App. D, pp. 20, n. 1; 31-33).

* The Trial Examiner had found that the Company's conduct also violated Section 8(a)(1), (3), and (5) of the Act, and recommended that the Board remedy these violations, too. However, the Board concluded (with one member dissent-

The Court of Appeals for the Eighth Circuit declined to enforce the Board's order. In a *per curiam* opinion, it held, on the authority of its earlier decision in *National Labor Relations Board v. Ritchie Manufacturing Co.*, 354 F. 2d 90, that Section 8(a)(4) does not "encompass discharge of employees for giving written sworn statements to field examiners" (App. A, p. 15). It also refused to find that the discharges independently violated Section 8(a)(1), since "[t]o do so would be to overrule *Ritchie* implicitly, and we are not prepared to take that action" (*ibid.*).

REASONS FOR GRANTING THE WRIT

For the second time, the Eighth Circuit has held that an employer may discharge an employee in reprisal for his having given an affidavit in a Board investigation of charges against it. This decision is erroneous, conflicts with decisions of other courts of appeals and, unless corrected, is likely to interfere with the Board's effective administration of the Act.

1. Under Section 8(a)(4), it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act." The Eighth Circuit here, as in its earlier *Ritchie* decision, has narrowly construed this section. It held that the section's protection for an employee who has "given

ing) that it would not effectuate the policies of the Act to assert its jurisdiction over these "independent and unrelated" violations and dismissed those portions of the complaint (App. D, pp. 22-23).

testimony" extends only to one who "has actually testified at a hearing," and does not "cover preliminary preparations for giving testimony." *National Labor Relations Board v. Ritchie Manufacturing Co.*, *supra*, 354 F. 2d at 101.

This interpretation runs directly counter to the section's manifest objective. By enacting Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238. Such freedom is necessary "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mutual Life Ins. Co. v. National Labor Relations Board*, 191 F. 2d 483, 485 (C.A.D.C.). The Board's investigation of charges is no less essential a part of the administrative process than the filing of charges that initiate the investigation or the formal hearing that follows it. Section 8(a)(4) must be construed to protect any employee who participates in the Board's investigative process from employer retaliation against him for having done so,* irrespective of whether the employee filed a

* The Board's powers under Section 11 of the Act, 29 U.S.C. 161, buttress this construction. That section authorizes the Board to compel persons, including employees, to give statements to Board agents during the investigation of charges. Cf. *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 768. The persons doing so need not have filed a charge, and may or may not testify at a Board hearing. They nevertheless are entitled to protection under Section 8(a)(4)

charge or actually gave testimony.' This has been the Board's long-standing interpretation of Section 8 (a) (4).³

from employer retaliation for their having been subjected to the Board's Section 11 powers: "Congress intended the protection [under Section 8(a) (4)] to be as broad as the power * * * to subpoena [under Section 11]." *Pedersen v. National Labor Relations Board*, 234 F. 2d 417, 420 (C.A. 2).

¹ An employee participating in the Board's investigation often is not called to testify at a formal hearing—because his testimony is cumulative, or because, as happens frequently, the case is settled or dismissed. See *Thirty-fourth Annual Report of the National Labor Relations Board* 212 (G.P.O. 1970). If the employer may punish the employee for giving a statement in the investigation—which is the effect of the court of appeals' decision—employees will be much less willing to cooperate in the Board's investigation, thus significantly impairing the Board's effectiveness in carrying out its duties.

² The predecessor of Section 8(a) (4) in the National Industrial Recovery Act (see Executive Order 6711-B (X NRA Codes 895), issued May 15, 1935), provided in pertinent part:

No employer subject to a code of fair competition approved under [the National Industrial Recovery Act] shall dismiss or demote any employee for making a complaint or *giving evidence with respect to an alleged violation* of the provisions of any code of fair competition approved under said title. [Emphasis supplied.]

The first National Labor Relations Board interpreted the italicized phrase to protect not only the act of testifying at a formal hearing, but also any "giving" of information relative to violations of the NIRA. See *Matter of New York Rapid Transit Corp.*, 1 NLRB 192, 193 (1934); *Matter of Ralph A. Freundlich*, 2 NLRB 147, 148 (1935).

Section 8(a) (4) now reads "testimony", rather than "evidence." But nothing in the legislative history suggests that this change was intended to diminish the broad protection previously accorded, so as to expose employees to reprisals if

The Eighth Circuit's decisions here and in the *Ritchie* case conflict in result with decisions of the Fifth Circuit. In *M & S Steel Company, Inc. v. National Labor Relations Board*, 353 F. 2d 80, the Fifth Circuit summarily sustained the Board's finding (148 NLRB 789, 792, 795) that an employer violated Section 8(a) (4) by discharging an employee because he gave an affidavit to a Board agent investigating an unfair labor practice charge. In *National Labor Relations Board v. Dal-Tex Optical Co., Inc.*, 310 F. 2d 58, that court enforced a Board determination (131 NLRB 715, 721, 729-730) that discharge of an employee because he appeared but did not testify at a Board hearing, violated Section 8(a) (4). Moreover, the Eighth Circuit's restrictive approach to Section 8(a) (4) is contrary to the expansive interpretation given that section by other courts of appeals in different contexts.⁹

their testimony is given through an affidavit in an informal investigation rather than as a witness in a formal hearing. To the contrary, a Senate Labor Committee memorandum described the new language as "merely a reiteration" of the provision found in Executive Order 6711-B, and added that the "need for this provision is attested" by the Board decisions cited above. See Comparison of S. 2926. (73d Congress) and S. 1958. (74th Congress), Senate Committee Print 29, 1 Legislative History of the National Labor Relations Act 1355 (1935).

⁹ See, e.g., *National Labor Relations Board v. Darling & Company*, 420 F. 2d 63 (C.A. 7); *National Labor Relations Board v. Gibbs Corporation*, 308 F. 2d 247 (C.A. 5), enforcing 131 N.L.R.B. 955; *National Labor Relations Board v. Eastern Mass. Street Ry. Co.*, 235 F. 2d 700 (C.A. 1), certiorari denied, 352 U.S. 951, enforcing 110 N.L.R.B. 1963;

2. Under Section 8(a)(1), it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 protects the employees' right "to form, join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This guarantee includes the right of employees to give information to the Board and to invoke its processes. If their employer then discharges them for doing so—as in the present case—this restrains them from freely exercising their Sec-

Pederson v. National Labor Relations Board, 234 F. 2d 417 (C.A. 2); *National Labor Relations Board v. Syracuse Stamping Co.*, 208 F. 2d 77 (C.A. 2); *John Hancock Mutual Life Ins. Co. v. National Labor Relations Board*, 191 F. 2d 483 (C.A.D.C.). But cf. *Hoover Design Corporation v. National Labor Relations Board*, 402 F. 2d 987 (C.A. 6), where the court held that a discharge because the employee threatened to file unfair labor practice charges with the Board did not violate Section 8(a)(4), citing in support the *Ritchie* case.

In the court below as well as before the Board, respondent relied on *Ogle Protective Service*, 149 N.L.R.B. 545. In that case, the trial examiner concluded that the discharge of an employee violated Section 8(a)(3), but declined to find that, because the employee was under subpoena to testify at a Board hearing when discharged, the discharge also violated Section 8(a)(4) "[s]ince the discrimination does not come within the precise language of Section 8(a)(4)." *Id.* at 566. However, no exceptions were filed to the examiner's decision and the Board adopted it *pro forma* (*id.* at 546, n. 2)—that is, without passing on its propriety. Where the Board itself has dealt with the scope of Section 8(a)(4), it has consistently held that it extends to and protects employee participation in the entire investigative process, not just actually filing charges or testifying at a hearing.

tion 7 rights. Thus, wholly apart from Section 8(a) (4), the discharges here violated Section 8(a) (1).

The holding of the court of appeals that the discharges did not violate Section 8(a) (1)—which the court viewed as required to avoid overruling indirectly its decision that no Section 8(a) (4) violation had occurred—conflicts with decisions of the Courts of Appeals for the Fourth, Fifth, and Tenth Circuits. See, e.g., *King Radio Corp. v. National Labor Relations Board*, 398 F. 2d 14 (C.A. 10); *National Labor Relations Board v. Southland Paint Co.*, 394 F. 2d 717 (C.A. 5); *National Labor Relations Board v. Electro-Motive Mfg. Co.*, 389 F. 2d 61 (C.A. 4).¹⁰ Indeed, in sustaining the Board's determination that discharging an employee because he gave a Board agent an affidavit violated Section 8(a) (1), the Fifth Circuit declared that "[t]he giving of an affidavit in the course of a Board proceeding is equivalent to giving testimony." *National Labor Relations Board v. Southland Paint Co.*, *supra*, 394 F. 2d at 721.

3. The decision below, if allowed to stand, will significantly impair the Board's administration of the Act. As stated above, employee willingness to

¹⁰ The Eighth Circuit's decision on the Section 8(a) (1) question is also at odds with the generally broad scope given that section to protect individuals from reprisal for participation in Board investigations. See, e.g., *Oil City Brass Works v. National Labor Relations Board*, 357 F. 2d 466 (C.A. 5); *Texas Industries, Inc. v. National Labor Relations Board*, 336 F. 2d 128 (C.A. 5); *Vogue Lingerie, Inc. v. National Labor Relations Board*, 280 F. 2d 224 (C.A. 3). Compare *National Labor Relations Board v. Marine Workers*, 391 U.S. 418.

participate in the Board's investigative process is essential to the Board's effective performance of its statutory duties. That willingness cannot but be significantly reduced if an employer may freely dismiss an employee for doing so—as the decision here permits.¹¹

¹¹ The fact that the Company's operations did not satisfy the Board's discretionary jurisdictional standards (see n. 4; *supra*, and accompanying text) does not diminish the importance of the case or the need for this Court to correct the Eighth Circuit's holding. The Company's operations are within the Board's statutory jurisdiction. See App. D, p. 20. Where, as here, the employer's actions interfere with the Board's processes and an employee's free access thereto, it is appropriate that the agency exercise its authority to protect its processes without regard to whether it would act with respect to the employer's other violations. See *Pedersen v. National Labor Relations Board*, *supra*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WM. TERRY BRAY,
*Assistant to the
Solicitor General.*

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

PAUL J. SPIELBERG,
*Attorney,
National Labor Relations Board.*

JUNE 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,305

*NATIONAL LABOR RELATIONS BOARD, PETITIONER.

v.

ROBERT SCRIVENER, d/b/a A A ELECTRIC COMPANY,
RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD.

[January 6, 1971.]

Before MEHAFFY and HEANEY, Circuit Judges, and
MEREDITH, District Judge.

PER CURIAM.

The National Labor Relations Board petitions this Court for enforcement of an order against Robert Scrivener, d/b/a A A Electric Company. The Board's decision is reported at 177 N.L.R.B. No. 65, 71 L.R.R.M. 1595 (1969).

The Board found that the Company violated Sections 8(a)(4) and (1) of the National Labor Relations Act by discharging three employees for having met, and having given a written sworn statement to, a Board field examiner investigating unfair labor practice charges filed against Scrivener. The Board dismissed other charges alleging that Scrivener had

violated Sections 8(a)(1), (3) and (5) of the Act, giving as a reason that Scrivener's operation did not meet the Board's discretionary jurisdictional standards.

The principal question raised on this appeal is whether Section 8(a)(4) of the Act, which makes it an unfair labor practice for an employer "to discharge * * * an employee because *he has filed charges or given testimony under this Act*," is to be construed to encompass discharge of employees for giving written sworn statements to Board field examiners. This Court stated in *N.L.R.B. v. Ritchie Mfg. Co.*, 354 F. 2d 90 (8th Cir. 1966), that "We are reluctant to hold that § 8(a)(4) can be extended to cover preliminary preparations for giving testimony." This reluctance continues. We are particularly hesitant to overrule or distinguish *Ritchie* in a case where the Board's jurisdiction to act is marginal. Compare, *Hoover Design Corporation v. N.L.R.B.*, 402 F. 2d 987 (6th Cir. 1968); *King Radio Corp. v. N.L.R.B.*, 398 F. 2d 14 (10th Cir. 1968); *Oil City Brass Works v. N.L.R.B.*, 357 F. 2d 466 (5th Cir. 1966).

The National Labor Relations Board suggests that if we are unwilling to overrule or distinguish *Ritchie*, we can accomplish the same result by upholding the Board's finding that the discharges complained of violated Section 8(a)(1) as well as Section 8(a)(4) of the Act. We are unwilling to take this course. To do so would be to overrule *Ritchie* implicitly, and we are not prepared to take that action.

We decline to enforce the order of the Board.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B
JUDGMENT

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1970**

No. 20305

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

vs.

**ROBERT SCRIVENER, d/b/a AA ELECTRIC COMPANY,
RESPONDENT.**

**APPLICATION [FOR ENFORCEMENT] OF AN ORDER OF
NATIONAL LABOR RELATIONS BOARD.**

This cause came on to be heard on the Application for Enforcement of Order of the National Labor Relations Board dated May 20, 1970, (Case No. 17-CA-3519), and on the Answer of Respondent to the Application for Enforcement, and the appendix and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the Application for Enforcement of Order of the National Labor Relations Board in this cause, be, and is hereby, denied,

in accordance with opinion of this Court this day
filed herein.

January 6, 1971

Costs taxed in favor of the Respondent:—	
Cost of 25 copies of Brief of Respondent—	\$259.20
Total taxable costs of Respondent —	\$259.20
for recovery from Petitioner, National Labor Relations Board.	

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

ROBERT C. TUCKER

by W. F. GRUENINGER
Chief Deputy
May 3, 1971

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1970

No. 20305

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

vs.

ROBERT SCRIVENER, d/b/a A A ELECTRIC Co.,
RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF ORDER OF
THE NATIONAL LABOR RELATIONS BOARD.

The Court having considered petition for rehearing en banc filed by counsel for petitioner and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

February 26, 1971

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD

Case 17-CA-3519

ROBERT SCRIVENER, d/b/a A A ELECTRIC Co.
and

LOCAL 453, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO

DECISION AND ORDER

On October 30, 1968, Trial Examiner John M. Dyer issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel and the Charging Party filed briefs in support of the Decision. The Charging Party also filed in response to the Respondent's exceptions to the Trial Examiner's Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the

Trial Examiner insofar as they are consistent herewith.

We find, in agreement with the Trial Examiner, that Respondent's operations have an impact on and affect interstate commerce within the meaning of Section 2(6) and (7) of the Act, and therefore fall within the statutory jurisdiction of the Board.¹ We also find, in partial agreement with the Trial Examiner, that although Respondent's operations do not meet the Board's discretionary jurisdictional standards,² it will effectuate the policies of the Act for the Board to assert jurisdiction in the present circumstances, but only to the extent and for the reasons set forth below.

As found by the Trial Examiner and established by the record, the Respondent on April 18, 1968, discharged employees Wilson, Sanders, Smith, and Don Cockrum in retaliation against them for hav-

¹ The branch manager of the Graybar Electric Company facility with which Respondent does business in Springfield, Missouri, George A. Griffin, testified that he had examined the records of Graybar at Springfield, and that his examination revealed that Respondent had purchased approximately \$4,769.33 worth of goods and materials from Graybar during the period of March 21 until May 9, 1968, and that his estimate was that approximately 90 percent thereof originated outside the State of Missouri. Griffin's testimony as to his examination of records and as to his estimate of interstate purchase is admissible and competent as evidence of impact on commerce within the meaning of Section 2(6) and (7) of the Act. *N.L.R.B. v. Jones Lumber Co.*, 245 F. 2d 388 (C.A. 9); *N.L.R.B. v. Operating Engineers*, 243 F. 2d 134 (C.A. 9); *Amalgamated Meat Cutters and Butcher Workmen of North America (The Great Atlantic and Pacific Tea Company)* 81 NLRB 1052, at footnote 1.

² *Siemons Mailing Service*, 122 NLRB 81.

ing met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against Respondent. We agree that said discharges interfered with the Board's investigation of those charges. The investigation of charges filed is an integral and essential stage of Board proceedings.³ It is clear that Respondent's conduct falls within the prohibitions of Section 8(a)(1)⁴ and (4)⁵ of the Act. These sections are designed, at least in part, to safeguard the procedure established for the vindication of Section 7 rights by assuring protection against employer retaliation to those who participate therein. As the Supreme Court has stated, Congress intended that "... all persons with information about unfair labor practices are to be completely free from coercion against reporting them to the Board."⁶ In these circumstances, public policy requires the Board to assert jurisdiction for the

³ See Section 101.4 of the National Labor Relations Board Statements of Procedure, Series 8, as amended, which provides that as a part of the investigation of unfair labor practice charges a member of the field staff shall interview representatives of the parties and other persons having knowledge as to the charges. Cf. *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301, at 308 where the Supreme Court stated that "(o)nce its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it."

⁴ Cf. *Electro Motive Manufacturing Co.*, 158 NLRB 534; *Southland Paint Co.*, 156 NLRB 22; *Grand-Central Chrysler, Inc.*, 155 NLRB 185; *A & P Import Co.*, 154 NLRB 938.

⁵ Cf. *Hoover Design Corporation*, 167 NLRB No. 62, reversed in part 402 F. 2d 987 (C.A. 6); *Manila Manufacturing Company*, 171 NLRB No. 151.

⁶ *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238.

purpose of remedying the Respondent's unlawful interference with the statutory right of all employees freely to resort to and participate in the Board's processes.⁷

We find, however, contrary to the Trial Examiner, that it will not effectuate the policies of the Act for the Board to assert jurisdiction herein over the alleged independent and unrelated violations of Section 8(a)(1), (3), and (5) of the Act. Although the statute imposes no restrictions on the Board's power to exercise jurisdiction over activities affecting commerce,⁸ the Board early adopted the position that it could better effectuate the purposes of the Act if it did not exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress. Consistent with that view, and as the result of experience in the administration of the Act, the Board decided to limit its exercise of jurisdiction to enterprises whose operations had a pronounced impact upon the flow of interstate commerce. The Board's self-imposed jurisdictional standards establish the guidelines by which the Board normally assesses such impact. Adhering to the standards in all but exceptional situations such as that discussed above⁹ insures the uniform administration of national labor relations policy and enables the Board

⁷ *Pedersen v. N.L.R.B.*, 234 F. 2d 417 (C.A. 2); *Philadelphia Moving Picture Machine Operators' Union, Local No. 307*, 159 NLRB 1614.

⁸ *N.L.R.B. v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675.

⁹ Compare, also, the Board policy of asserting jurisdiction over all employers whose operations have a "substantial" impact on national defense. *Ready Mix Concrete & Materials, Inc.*, 122 NLRB 318.

to concentrate ~~its~~ resources on resolving labor disputes having substantial impact on commerce.¹⁰ This case would have been dismissed entirely on jurisdictional grounds had the Respondent not interfered with its employees' right to resort to the Board's processes. The reason is that, unlike remedying the violations of Section 8(a)(4), the remedying of the alleged violations of Section 8(a)(1), (3), and (5) has no immediate impact on the vindication of the right of an individual to resort to the Board's processes and thus provides no independent basis for asserting jurisdiction. In these circumstances, we find that equal and effective administration of the policies of the Act require us to limit our exercise of jurisdiction to remedying the Section 8(a)(4) violations.

Accordingly, we shall dismiss those portions of the complaint alleging independent and unrelated violations of Section 8(a)(1), (3), and (5) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Robert Scrivener, d/b/a A A Electric Co., Springfield, Missouri, his agents, successors, and assigns, shall:

1. Cease and desist from interfering with his employees' right to be interviewed by an agent of the Board and to cooperate with the Board in its investigation of charges by laying off or discharging his employees for exercising such right.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

¹⁰ See *Siemons Mailing Service*, *supra*.

(a) Offer to Don Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders reinstatement in accordance with the recommendations set forth in that section of the Trial Examiner's Decision entitled "The Remedy," insofar as those recommendations relate to the discharge of the above employees occurring on April 18, 1968.

(b) Make Don Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them in accordance with the recommendations set forth in that section of the Trial Examiner's Decision entitled "The Remedy," insofar as those recommendations relate to the discharge of the above employees occurring on April 18, 1968.

(c) Notify Don Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, contracts and contract bids, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at his Springfield, Missouri, shop and office, copies of the attached notice marked "Appendix."¹¹ Copies of said notice, on forms provided by

¹¹ In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

the Regional Director for Region 17, after being duly signed by his representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to any unfair labor practices alleged but not herein found.

Dated, Washington, D. C.

FRANK W. McCULLOCH, Chairman

HOWARD JENKINS, JR., Member

SAM ZAGORIA, Member
National Labor Relations Board

[SEAL]

Member Fanning, concurring in part and dissenting in part:

I agree with the majority's decision in asserting jurisdiction for the purpose of remedying Respondent's unlawful discharge of those employees who utilized the Board's processes. However, I dissent from my colleagues' refusal to extend the protection of the Act to also remedy the violations of 8(a)(1), (3), and (5) of the Act as found by the Trial Examiner. Once the Board asserts jurisdiction, public policy requires the fullest exercise thereof in order to protect employees from any conduct which is unlawful under the Act. See *Philadelphia Moving Picture Machine Operators' Union*, 159 NLRB 1614, footnote 3. I would therefore affirm the Trial Examiner's Decision in full.

JOHN H. FANNING, Member
National Labor Relations Board

Form NLRB-4632
(1-65)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

**NATIONAL LABOR RELATIONS ACT
(AS AMENDED)**

we hereby notify our employees that:

WE WILL NOT interfere with your right to be interviewed by or give statements or affidavits to agents of the National Labor Relations Board by laying off or discharging you because you do so.

WE WILL offer Donald Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders their former jobs with all of their rights and any backpay due them.

WE WILL notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military

Training and Service Act, as amended, after discharge from the Armed Forces.

ROBERT SCRIVENER, d/b/a
A A ELECTRIC Co.
(Employer)

Dated ----- By -----
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East Twelfth Street, Kansas City, Missouri 64106, Telephone 816-374-5181.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

ROBERT SCRIVENER, d/b/a A A ELECTRIC Co.

and

LOCAL 453, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO

James G. Walsh, Jr., Esq., of Kansas City, Mo.,
Counsel for the General Counsel.

Donald W. Jones, Esq., of Church, Prewitt, Jones,
Wilson and Karchmer of Springfield, Mo., for the
Respondent.

Benjamin J. Francka, Esq., Jack Moore and Ray
Edwards of Springfield, Mo., for the Charging
Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

JOHN M. DYER, Trial Examiner: On March 21, 1968,¹ Local 453, International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the Union, the IBEW, or Local 453, filed a charge alleging violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, by Robert Scrivener, d/b/a A A Electric Co., herein called Respondent, Scrivener, or the Company. This charge was amended on May 13 to additionally allege

¹ Unless otherwise specified all dates herein occurred in 1968.

violations of Section 8(a)(4) of the Act. The Regional Director of Region 17 of the National Labor Relations Board, herein called the Board, issued a complaint and notice of hearing in this case on May 17 alleging that Respondent violated: (1) Section 8(a)(4) of the Act by the discharge of four employees on April 18 and the refusal to reinstate three of them; (2) Section 8(a)(3) by discharges of three employees on March 19 and 20, layoffs of two employees on March 27 and refusals to reinstate one of these employees; (3) Section 8(a)(5) of the Act by refusing to bargain with the Union on and after March 18; and (4) Section 8(a)(1) by interrogating employees, threatening them with loss of employment, and blackballing them from other employment and encouraging employees to join a union of Respondent's choice and polling them to ascertain their union sympathy.

Respondent's answer admits that the Union is a labor organization, that Respondent is a sole proprietorship in Springfield, Missouri, and that the charges were filed and received but denies both that Respondent is subject to the jurisdiction of the Board and the remaining allegations of the complaint.

The threshold question here is whether without discretionary jurisdictional standards being met, the Board should assert jurisdiction on a statutory basis since the complaint alleges interference with employees because they met with and gave evidence to a Board agent conducting the investigation of this case. If this question is answered affirmatively there are subsidiary questions such as the reasons for termination of employees and the motivation of the other acts alleged, the determination of which is based mainly on the credibility of the witnesses.

All parties were afforded full opportunity to participate and to examine and cross-examine witnesses in the hearing held June 25 and 26, at Springfield, Missouri. All parties have filed extensive briefs which have been carefully considered.

Upon the complete record in this case and on my evaluation of the reliability of the witnesses based both on the evidence received and my observation of their demeanor and on the fact that certain portions of General Counsel's evidence are undenied and therefore stand uncontradicted by Respondent, I hereby make the following:

Findings of Fact

I. The Business Involved and the Labor Organization

Respondent Robert A. Scrivener does business as A A Electric Co. and is a sole proprietor maintaining his place of business in Springfield, Missouri, where he is primarily engaged as an electrical contractor installing wiring and electrical fixtures, etc., in residential construction. During 1967 Respondent's gross revenues totaled \$68,938.81 and during such time Respondent purchased from Graybar Electric Company goods and materials used in electrical contracting work in the amount of \$23,126.62.

Mr. George A. Griffin, branch manager of the Graybar Electric facility in Springfield, Missouri, for the past 13 years, testified that he had been a branch manager for some 2 years prior to that and was familiar with the names and origins of the supplies and equipment maintained and sold in Graybar's Springfield facility. He testified that Graybar is a nationwide company with 147 locations and that

it had done and was currently doing business with Respondent. Graybar's Springfield facility is under a regional office in Kansas City which maintains audited copies of the accounts of the customers of the local Graybar facilities in its region. The local facilities such as Springfield maintain unaudited copies of the sales tickets or purchase orders of each customer and so have a current minimal figure of each customer's account.

Mr. Griffin testified that in response to General Counsel's request, he had contacted his regional office in Kansas City and that the business records maintained there reflected that Respondent's purchases in 1968 until shortly prior to the hearing amounted to approximately \$18,000. Mr. Griffin further testified that he had checked the records kept locally and for a 7-week period, March 21 until May 9, determined that Respondent's purchases amounted to \$4,769.33 as a minimum figure.

Griffin was asked to estimate from his knowledge of the stock maintained locally by Graybar the percentage of materials which originated outside of Missouri and answered that about 95 percent of the goods came from out of State. He was then asked to use the copies of the purchase orders available to him and estimate the percentage of goods bought by Respondent which originated from out of State and estimated that approximately 90 percent of Respondent's purchases were of goods which originated outside of Missouri. From these figures for less than half of 1968, it would appear that projected for the full year Respondent's purchases from this one supplier, Graybar, of goods which originated from out of State would be in excess of \$30,000.

Griffin's knowledge of the origin of the goods sold at this facility is based on company records, his

knowledge of the business, and his management of this facility for a number of years. His estimates are therefore entitled to weight by me and I credit them.

I conclude and find that Respondent does not meet the Board's discretionary jurisdictional standards, but that the amounts involved are clearly more than *de minimis* as the Board has determined that standard before, and that Respondent's purchases of goods shipped in interstate commerce has an impact on and affects interstate commerce, and that statutory standards for Board jurisdiction have been met here.

General Counsel and the Charging Party urge the Board to exercise jurisdiction here because a part of this case involves the question of whether Respondent has abused Board processes and violated the statutory right of individuals to resort to Board processes by discharging individuals in violation of Section 8(a)(4). They contend that in such a situation public policy demands that the Board exercise its jurisdiction to the fullest extent possible.²

Respondent argues that the jurisdictional facts are *de minimis* at best (a point I have rejected), and that it would be unjust and a violation of the constitutional guarantees of equal protection and due process for the Board to assert jurisdiction here. Respondent's latter claim as set forth in its brief alleges that small businesses such as this can be made to answer for violations of the Act merely by the General Counsel using the ploy of alleging that Section 8(a)(4) of the Act has been violated while such a company would be denied an opportunity to use

² See *Philadelphia Moving Picture Machine Operators' Union Local No. 307 I.A.T.S.E. (Velio Iacobucci)*, 159 NLRB 1614, and *Eugene Pedersen v. N.L.R.B.*, 234 F. 2d 417 (C.A. 2).

the election processes of the Board. This argument begs the issue of the *Pederson* case, *supra*, since assertion of jurisdiction ultimately will be based on the determination of whether such a company has violated Section 8(a)(4) of the Act. If after hearing the evidence the answer is that the company has not breached Section 8(a)(4) then there is no reason to assert jurisdiction in vindication of public policy, and jurisdiction of the matter would be declined.

In furtherance of its position Respondent argues from the facts of the instant case and from decisions it has interpreted that a violation of Section 8(a)(4) can not be shown here and that the complaint should be dismissed. As will be seen herein, I have determined that Respondent did violate Section 8(a)(4) of the Act, thereby interfering with Board processes and in violation of public policy and accordingly recommend that the Board assert its statutory jurisdiction in this matter.

Accordingly, I conclude and find that it will effectuate the purposes of the Act for the Board to assert its statutory jurisdiction over this Respondent, since Respondent's activities affect interstate commerce and do have an impact thereon.

Respondent admits and I find that Local 453, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. *Background and Undisputed Facts*

Robert Scrivener testified he has been an electrician since 1936 and has belonged to either the Union herein or to another IBEW local in Tulsa, Oklahoma, for approximately 20 years. Approximately 3 years

ago Scrivener started his present business as A A Electric Co., which he runs from a shop next to his home in Springfield, Missouri. His wife assists him by apparently handling the bookkeeping and clerical functions. Materials and supplies are kept at the shop and the employees report there to load their trucks and receive their assignments, and return there after work.

Although Respondent's principal work has been in the area of residential construction, Scrivener has had some commercial work such as wiring apartment houses. In mid-March Scrivener had work in a number of single-family homes, one or more duplexes, and at least one apartment house. At that time he had six employees; three journeymen, Wesley Smith, an employee since August 1966, Albert Wilson from early 1965 until early 1966 and from February 1967 on, and Bill Cockrum since February 1968; and three apprentices or helpers, Claude Sanders employed from February or March 1967, Charles "Don" Cockrum employed on 4 or 5 different occasions over the 3-year period with the last beginning January 1968, and Boyd Perryman.

There is disagreement as to the manner of termination of the employees on various dates although there is no disagreement as to the dates they ceased working for the Company nor that Respondent hired two new employees after learning of the union activities of five of the six employees it had in mid-March. Further there is disagreement regarding some of the statements Scrivener is alleged to have made but there are certain remarks and actions of his which are undenied.

The parties agree that the unit appropriate for collective bargaining at Respondent is "All employees employed by the Respondent excluding office

clerical employees, guards and supervisors as defined in the Act."

The Union and the General Counsel claim that the makeup of the unit as of the morning of March 19, the time when the union representatives met with Respondent and orally claimed a majority and demanded recognition, is the proper one on which to determine majority status. Under this theory the unit consisted of the six employees named above.

Respondent at the hearing took the position that the unit for purposes of determining majority should consist of the six employees named above plus the employees it had at the time of the hearing. These additional employees would be journeyman Clyde Hunt, hired by Scrivener on March 19 after his meeting with Union Officials Jack Moore and May Edwards, apprentice Jim Statton hired by Scrivener on March 20 or 21, Richard Claybaugh,* an employee of another firm who works for Scrivener when he wants to do so if Scrivener has work available, and Albert Hunt,* Clyde Hunt's son, who works part time during school vacation in the summer when he wants to work and Scrivener has work available. Respondent also claims that Clyde Hunt and Claybaugh had both worked before March 20 and should be included in the unit if March 20 were the appro-

* Under applicable Board law neither Claybaugh or Albert Hunt, qualify as employees entitled to a voice in determining a bargaining agent since both from Scrivener's description are casual employees working only when they felt like it and then only if Respondent has work available. Additionally, Albert Hunt would seem to be further disqualified as a summer part-time employee with no expectation of future employment. Accordingly, I conclude and find that neither of them can be considered as employees in determining the employee complement on which to determine majority status.

priate date for unit determination. Finally at the hearing Respondent said the Board should determine the appropriate date and the employee complement.

In its brief Respondent changes its position completely on these matters and asserts that the Union did not make a true legal demand on it during the March 19 meeting, since it claims the Union demanded it then sign a contract containing nonmandatory bargaining subjects. The first legal demand, according to its theory, occurred on March 21, when it received the Union's letter containing a demand and alleging that it had violated the Act. Respondent states that on that date its employee complement consisted of Claude Sanders, Don Cockrum, Boyd Perryman, Clyde Hunt, Jim Statton, and Richard Claybaugh, and that only Cockrum had signed a union card of this group.⁴ Under its theory employees Bill Cockrum, Wilson, and Smith had separated themselves from its employ on March 20 and were not part of the unit.

As can be seen from Respondent's shifting positions, it did not have an original theory in regard to these questions either when it refused to bargain with the Union, or at the trial of this matter, but rather has fashioned a theory to suit its version of the facts following the hearing.

Respondent however maintained one other position relevant to the refusal-to-bargain allegation and that is that when he was shown the five union authorization cards, Scrivener claims he had a good-faith doubt as to the genuineness of the signatures. His contradictory testimony in regard to this point and my decision that Scrivener acted in bad faith will be set forth below.

⁴ Respondent forgets that Sanders had also authorized the Union to represent him by signing an authorization card.

In their testimony it appeared to me that Wilson, Smith, Sanders, and Bill Cockrum testified straightforwardly and tried to state the facts as they remembered them. Scrivener however testified to different things depending on who was questioning him and contradicted himself on a number of items such as whether he did or did not tell Jack Moore he doubted the genuineness of the signatures on the union authorization cards. Further Scrivener's undenied actions contradicted some of his testimony.

As to employee "Don" Cockrum I have determined to credit his testimony where it is substantiated either by his affidavit or other independent testimony. Cockrum has been placed in a peculiar position by the circumstances existing at the time of this hearing. Sometime after his layoff on April 18, Cockrum was arraigned on a criminal charge and had a preliminary hearing. Through the intercession of "Don" Cockrum's "in-laws" Scrivener rehired him and through or with Scrivener's acquiescence, he met with Respondent's Attorney Jones, who was at that time Respondent's counsel in this matter, and retained him as his counsel in the criminal action. Cockrum's retention of Jones occurred after the issuance and service of the complaint in this matter and despite the fact that the complaint contained an allegation that "Don" Cockrum had been discharged by Respondent in violation of Section 8(a)(4) of the Act. When these facts came out during the hearing, Attorney Jones drew from Cockrum an agreement that Jones had told Cockrum that the two matters must remain separate and distinct.

I feel that this situation placed Cockrum in a most unenviable position when he was prepared, according to his affidavit, to testify against the Employer who had now rehired him at the behest of Cockrum's

"in-laws" with a criminal charge hanging over him. Here he was to testify against the interest of this employer who is represented by an attorney upon whom Cockrum relies to defend him in a criminal action. The feelings of mortal man and his emotions can not be separated or compartmentalized to the degree Attorney Jones suggested to Cockrum and to expect such is asking the impossible of fallible beings, as Cockrum's testimony amply demonstrated. I feel that both Attorney Jones and "Don" Cockrum erred in their judgment in creating such a situation.

After commencing his testimony "Don" Cockrum, according to counsel for the General Counsel, answered questions differently and contrary to the manner in which he had responded in preparation for the case and contrary to his affidavit and General Counsel claimed surprise. On the basis of this claim and Cockrum's general demeanor, General Counsel was allowed to proceed with some leading questions. It became evident to me that Cockrum was seeking to distort and change his testimony to place Respondent's case in a more favorable light. When Cockrum identified the affidavits he had given and was reminded of the oaths he had taken in giving the affidavits and as a witness in this hearing, his testimony began to agree with the previous affidavits in all but one major respect. That point will be discussed *infra*. Where Cockrum's oral testimony is contrary to the interest of Respondent and in accord with his sworn affidavit, I credit it, and where his testimony is contrary to his verified affidavits and the testimony of others, I must discredit his oral testimony under these circumstances. Respondent has no basis for complaint of such credibility resolutions since they result from a situation created by Respondent or Respondent's counsel.

Recitation of the events hereafter is based either on uncontradicted testimony or contradicted testimony where I have resolved credibility conflicts in accord with the observations made above and the weight of the evidence.

B. *The Events*

1. On March 15, while working at a jobsite on Pinehurst with his helper Claude Sanders, Wesley Smith was approached by Scrivener who, after looking over the jobsite, asked him to come to the truck. There Scrivener broached to Smith the proposition that the Company's employees join District 50,^{*} with the result that they might get a lot of commercial work and have some residential work as fill-ins rather than have mainly residential work. Scrivener asked whether Smith would talk to the men when he got to the shop that evening about going into District 50. Smith agreed to do so.

I find and conclude that Respondent by this action encouraged his employees to join a labor organization of his choosing and that he thereby violated Section 8(a)(1) of the Act.

2. Albert Wilson testified that when he returned to the shop on the evening of March 15, all the men had gotten there but Smith and Sanders. Scrivener told the men to hang around a few minutes that Smith wanted to talk to them but that he could not say what it was about because he was not supposed to know. A few minutes later Scrivener told the men that it concerned their joining District 50.

When Smith came in he asked each of the men what they thought about joining the Union. Most of

^{*} District 50 is District 50, of the United Mine Workers of America which organization has an office in Kansas City.

the men indicated that they would join District 50 and others indicated that they would go along with the majority. On conclusion of this polling of the men as to the union sentiments, Smith turned to Scrivener and told him "there it is." Scrivener told them that several electrical contractors in the vicinity belonged to District 50 and were doing real good. Wilson mentioned that there was a picket on one of the companies at that time. Scrivener said he would either write or go see District 50 in Kansas City. Some further discussion was had among the men.

I conclude and find that Smith was acting as an agent of Scrivener in conducting this poll of the employees to ascertain their union sympathy and that Respondent thereby violated Section 8(a)(1) of the Act.

3. In the evening of March 15, Bill Cockrum telephoned Scrivener and asked what he thought of Local 453. Scrivener replied he would not join with Local 453 although he had been a member of that Union at one time, and that he could not afford to belong to the National Electrical Contractors Association, herein called NECA, and pay the 2-percent assessment.

Later that evening Cockrum called Ray Edwards of Local 453 and discussed the situation, asking if Local 453 was willing to represent them. Edwards said they would and a meeting was arranged for Monday, March 18. Bill Cockrum thereafter talked to Wilson and others concerning the situation and meeting with Local 453.

4. On the evening of March 18, Bill and "Don" Cockrum, Smith, Sanders, and Wilson met with union representatives, Moore and Edwards, at the union hall. The men told Moore and Edwards of the events and said they did not want to join District

50. Moore said Local 453 would represent them and asked them to sign union authorization cards saying he knew Scrivener and would see him and if necessary show Scrivener the authorization cards to prove he was authorized to represent them. He added that if Scrivener would not agree to recognize the Union he could use the cards to petition for an election. Moore then answered questions as to their becoming union members and assured the five men that they could take the wireman's examination and there would be no problems regarding their ages. All five men then signed union authorization cards.

After the meeting Moore called Scrivener and asked to meet with him the next day. Scrivener agreed to come by the union hall the following morning.

5. Moore and Scrivener had known one another for 20 years or so and talked about a number of topics on Tuesday morning, March 19, before getting to the reason for the meeting. Moore told Scrivener the Union represented a majority of Scrivener's employees and wanted a contract with him. Scrivener said that he doubted that the Union had a majority of his employees. To resolve Scrivener's doubt Moore showed him the signed cards. Scrivener said Moore had one card more than he had employees. Moore said it was just the opposite that Scrivener had one more employee, Perryman, who had not signed a union card. Edwards asked Scrivener which card he was questioning and Scrivener replied "Don" Cockrum. Edwards said he had seen Cockrum on the job the previous day. Scrivener acquiesced saying he guessed Cockrum was working.

Scrivener asked if Moore wanted him to send the men to the union hall. Moore said no that Scrivener was to keep the employees, that they would work out

a contract. Scrivener asked if he could get additional men from the hiring hall if he was to expand his business and Moore assured him he could. Scrivener said he was going to talk to his attorney and would get in touch with Moore thereafter and that he was not sure about an agreement since there was another organization that the people might be tied to. Moore said there was no fear of that, the IBEW was the only organization involved and he had this information from the people themselves. Scrivener asked about a contract and Edwards gave him a copy of the construction agreement.

Scrivener testified that Moore gave him a deadline of 6 p.m. to sign the union contract and that Moore said he would replace all of Scrivener's men with good men from the union hall.

I have no doubt that the Union would have liked to have Scrivener sign a standard contract as soon as possible, but I do not believe Scrivener was given a deadline nor that Moore and Edwards said Scrivener's men would be replaced by men from the union hall. I credit the testimony of Moore and Edwards against Scrivener, noting further that such tactics would virtually make it impossible for the Union to organize any company if the employees who sought to be represented would immediately be replaced by other union members upon the signing of a union contract. Such a self-defeating tactic would become known quickly in the trade and would halt any organizational activities the Union attempted.

It is clear that Scrivener reported such statements to employees thereafter, seeking thereby to frighten them away from the Union in an attempt to undermine the Union's majority. I conclude that Scrivener's testimony is not to be credited.

In its brief Respondent/ claims that the testimony taken as a whole demonstrates that Scrivener's claim that Moore demanded he sign the particular agreement, join NECA and pay it a 2-percent fee is borne out by the fact that the Union agreed that all of its signatories in the area are either members of NECA or have agreed to be bound by that contract. The construction agreement calls for a payment of 1 cent an hour towards an apprenticeship and training program, a further amount of 1 percent of the gross monthly payroll to be paid into a benefit fund, a contribution of 15 cents an hour for payment of a health and welfare fund, and an amount of 4 percent of the gross payroll toward a vacation fund. Respondent has not made clear whether the 2 percent it speaks of is a part of the above amounts or is a membership fee for NECA or just what it represents. I can only determine from the evidence before me that the Union does have signatories who agree to be bound by the terms of the NECA contract and are not NECA members and do not assume the obligation of NECA membership or dues and fees. I find that the Union did not demand that Respondent join NECA as a part of any contractual agreement between Respondent and the Union and that Respondent's claim in this direction is not true.

6. During March 19, Scrivener visited the jobsites several times and first appeared at the jobsite where Wilson, Smith, Sanders, and Perryman were working shortly after his meeting with Moore and Edwards.

Wilson testified that it was about 10:30 a.m. when Scrivener came in the apartment house jobsite and said, "Bud did you guys sign those cards at the hall last night?" Wilson replied "Yes," and Scrivener asked what they wanted to do it for. Wilson said

they thought Scrivener wanted a union. Scrivener said no. Wilson said Scrivener was talking District 50 awfully strong. Scrivener said he didn't want it and asked if they knew what they had done. Wilson said they were trying to better themselves. Scrivener said that he had just come from the union hall and that Jack Moore told him that if they organized Scrivener, that Scrivener could not keep his present employees, and that the Union would replace them with good men. Scrivener said the men knew they could not go to work for another shop and he was telling them this for their own good. Wilson said he had known Moore for several years and could not believe Moore said that. Smith and Perryman came in the room and Scrivener noted that Perryman was the only one who had not signed a card and said something about letting everyone go. Smith and Wilson told Scrivener they were going through with the Union.

7. After lunch Scrivener came back to the apartment and asked Wilson if he had seen Doyle Luce, of Aton Luce Electrical Contractors. Wilson said he had not. Scrivener said Luce was supposed to come by and give him a bid on finishing the apartment job. Scrivener told Wilson and the others to get everything roughed in, that they were going to have to get somebody else to finish the job and at quitting time they were to take all the materials and supplies back to the shop and to wait there because he wanted his lawyer to talk with them.

8. After the morning discussion Scrivener spoke to Sanders saying he understood they had signed cards at the union hall. Sanders said that was right. Scrivener said he had not thought the boys would do him that way and that Moore told him if he signed a contract with the Union they would not use any of

the five card signers. Sanders said that if the Union operated that way he did not want any part of it.

I conclude and find that Scrivener's questioning of the employees as to their signing union cards and threatening that they would lose their jobs as a result of their activity as set forth in 6, 7, and 8 above violate Section 8(a)(1) of the Act.

9. "Don" Cockrum rode to the shop with Scrivener after work on March 19. Cockrum orally testified that during the ride Scrivener said he might have to lay some of the guys off. He continued that if they would have come and talked to him about it he might have reconsidered but they went up there (to the Union) and signed up without talking to him. Scrivener said he would probably let Don's brother go and that the men had gotten him into a mess.

"Don" Cockrum's testimony concerning Scrivener's statement about another electrical contractor is contrary to his affidavit. Cockrum stated orally that Scrivener told him electrical contractor James Mitchell was working across the street from the jobsite that day and in conversing with him, Mitchell told Scrivener that if Scrivener's men came out there looking for a job Mitchell was going to offer them \$1.25 an hour (the minimum wage and a sum far below what the men apparently were receiving).

"Don" Cockrum identified his affidavit and admitted he had sworn that its contents were true. The affidavit recites that on the trip with Scrivener to the shop, Scrivener said he would probably have to let everybody go because they had gotten him into "a hell of a mess," and he was going to have to let Don's brother go for sure since he was the ring-leader, and he would really be in a mess if he earned a little bit more money (apparently referring to the Board's jurisdictional standards). Cockrum's affi-

davit said Scrivener told Cockrum he had called James Mitchell Electric and told Mitchell that if any of Scrivener's employees called him for a job that Mitchell was to pay them \$1.25 an hour even if he could use them, and that he had called some other contractors and they wouldn't be needing any help. Scrivener said the employees had made their beds and now they could sleep in them.

"Don" Cockrum stated the affidavit was in error and that Scrivener had not called Mitchell but that Mitchell had called Scrivener. When asked to explain why he would sign and swear to a statement containing such a distortion and particularly where he had initialed a correction right in the middle of this particular section, Cockrum replied that he did not read it over carefully. Thereafter Cockrum admitted that Scrivener said the following two sentences reported in his affidavit: "He said he had called some other contractors and they wouldn't be needing any help. He said the employees had made their bed and now they could sleep in it."

Taking the testimony as a whole and noting again the position in which Cockrum was placed by his actions and those of Respondent and Respondent's attorney, I find that the version of the conversation concerning Mitchell contained in the affidavit is the true version of what occurred and that this was at least partially corroborated by Cockrum. It would not make sense for Scrivener to have contacted other employers to find out whether they would use his men and at the same time not have contacted Mitchell in regard to this same question.

I conclude and find that Scrivener in his conversation with Cockrum on the afternoon of March 19, violated Section 8(a)(1) of the Act, by threatening

- employees with loss of their jobs because of their union activity.

Scrivener's statements to Cockrum about the other electrical contractors was an implicit threat of blackballing the men for their union activities and was the forerunner of and renders credible Smith's version of a telephone conversation between Scrivener and himself on March 20 in 12 below.

10. The employees got to the shop about 4:15 p.m. Scrivener opened the meeting with the men after Attorney Jones' arrival by stating Moore told him he would not be able to use the five men he presently had employed and that he would replace them with good men. Scrivener said there was no way he could be forced to join Local 453 because he did not come under the Board's jurisdictional amount of \$50,000. Jones and Scrivener apparently looked over some tax forms and agreed on the absence of the jurisdictional amount. Jones then talked to the men mentioning that the initiation fee for Local 453 was something like \$300. Bill Cockrum spoke up saying Jones was wrong, that it was \$50. Jones said he might have been thinking of the initiation fee for the Sheetmetal Workers.

After some more discussion, the three journeymen, Smith, Bill Cockrum, and Wilson advised Scrivener that they wanted Local 453 as their bargaining representative. Scrivener, who admitted he had made up his mind earlier in the afternoon to discharge the men and had asked his wife to make up their checks, got their checks from the office, brought them out, and started to hand them to the three journeymen. Bill Cockrum told Scrivener he wanted to know whether or not he was fired before accepting the checks. Scrivener turned to Attorney Jones and asked what he should say. Jones said he would let

them go and let Jack Moore handle them from the union hall. Scrivener nodded his head affirmatively to Cockrum and gave the three men their checks. They picked up their tools and left the shop. While walking towards their cars, Scrivener came out of the shop and said they were welcome to come back the next morning if they wanted to go to work.

11. On the morning of March 20 all the men reported for work and were given assignments by Scrivener. Smith and Bill Cockrum were scheduled to go to the apartments on South Florence Street and were loading their trucks with materials when Scrivener came outside the shop and talked to them and Wilson. Scrivener said there was one thing his attorney wanted to know and that is whether they were affiliated in any way with Local 453. The three men said they were. Scrivener said that he could not use them. The men loaded their tools and left.

I conclude and find that the discharges of Bill Cockrum, Wilson, and Smith on March 19 and 20 were violative of Section 8(a)(3) and (1) of the Act. I do not credit the tortured explanation of Scrivener that he did not want the men to get in trouble with the Union and was allowing them to leave for better jobs.

12. On the evening of March 20, Smith received a telephone call at home from Scrivener. Scrivener told Smith he would like him to come back to work and hated to see Smith's family suffer on account of this thing. Scrivener said the other contractors such as Balmer, Ivan Franks, and Jim Mitchell, had gotten together to keep them from working and that he would not find a job, while they would furnish Scrivener with men if he needed them. Smith told Scrivener he was planning on going through with the Union because he felt he could better himself. Scri-

vener said that if he wanted to change his mind he could come back to work within 2 weeks.

I conclude and find that Scrivener in this conversation violated Section 8(a)(1) of the Act by threatening the employees with blackballing because they had chosen the Union as their collective-bargaining agent.

13. Following the Union's demand letter of March 20, in which it protested the discharge of the three employees on March 19 and 20 and said it was filing a charge, the Union filed a charge of 8(a)(1), (3), and (5) violations on March 21. Respondent wrote a letter to the three discharges dated March 22, which they did not receive until Monday, March 25.* This self-serving letter claims that Respondent has

* The letter follows:

Gentlemen:

This letter is written to clarify the fact that I have not discharged either one of you and you are all free and welcome to work for me as usual at any time, whether or not you are members of the I.B.E.W. Union or any other union.

I will be glad to have any or all of you work as usual, so long as I have work available which you can do, and I would be glad to have you report to work Monday morning as usual.

It was never my intention to discriminate against you in any way for any interest you may have in any union. However, I did feel it was my duty to tell you what had been told me by Mr. Jack Moore of the I.B.E.W. Union, when he demanded me to sign a contract with him, to the effect that if I signed such contract I would be required to hire all men through his hiring hall and that Mr. Moore would not permit you men to work for me, in all probability, as you would have to stand in line in the hiring hall procedure and I would have to hire the men who had first signed in the hiring hall were without jobs.

not discharged any of the three and that they are free to report back to work on Monday morning, March 25. After contacting the Union for advice, the three men reported back for work on Tuesday, March 26, and worked that day and March 27. Cockrum left work early because of an injury to his son and when Smith and Wilson reported to the shop that evening Scrivener told them they were caught up and he would have to lay two of the three of them off for a few days. A suggestion was made that straws be drawn between the three. Smith and Cockrum were laid off following the drawing and Wilson was kept on along with new employees Clyde Hunt and Jim Statton.

14. On April 1, Wilson was sick and Scrivener called Smith, according to Wilson at his suggestion, and had Smith report back to work. Smith and Wilson continued to work until April 18 with the remainder of the employees. At that time everyone was back to work except Bill Cockrum.

15. On April 17, a Board field examiner met with Scrivener for several hours to discuss the charge against the Company, as well as the Company's contention made in its letter to the Regional Director of March 22, that it did not come within the jurisdiction of the Board.

That evening the field examiner met with Bill and "Don" Cockrum, Smith, Sanders, and Wilson at the union hall. The field examiner interviewed the five employees that night and only took affidavits from three of the five due to the lateness of the hour.

16. On the following morning, April 18, when Wilson went to work, Scrivener motioned him into the office and asked "Did you guys meet with the Labor Board last night?" Wilson answered yes. Scrivener said "They sure don't talk much do they?"

Wilson replied no and went on out to gather material to go to the job. Later, while he and "Don" Cockrum were getting ready to go out, Scrivener came up to him again and said, "You say you met with the Labor men last night?" Wilson answered "Till about 11 or 11:30." Scrivener said "That old boy sure don't tell you nothing." Wilson answered "No Bob, he's a journeyman."

While Sanders was at the shop getting ready to go to work on April 18, Scrivener came up and asked him, "Did the boys find out anything last night?" Sanders answered not that he knew of.

Scrivener did not directly deny the testimony of Sanders and Wilson but rather testified that he had no knowledge as to whether any of the men talked to the Board field examiner prior to laying them off on April 18. He maintained that the first time he learned who had talked to the Board field examiner was when Wesley Smith told him about it. Asked when that was, Scrivener said "I would say on April 20." According to Scrivener, Smith told him the identity of the men who spoke to the field examiner while Smith was at the shop getting ready to go to work. Scrivener was not able to say where Smith was working that day and was not completely sure of the date.

Smith was not questioned about this conversation, it first being mentioned during Respondent's defense. Scrivener's guess of April 20 as the date of the conversation is obviously incorrect since Smith was laid off on April 18 and did not work for Scrivener until called back on May 4. If the conversation took place, and it seems possible that it did, then it must have occurred in the morning of April 18, the same day Scrivener laid Smith and the other men off.

Common sense would indicate that when the Board field examiner was in the area investigating the case and interviewing Respondent and the case involved a claim of majority and individual discharges, that the Board examiner would investigate the charging party's case by interviewing the discharges and the individuals who made up the union majority. So it should have been no secret from Scrivener that the Board field examiner would meet with the five union card signers.

I find from the testimony of Scrivener, Sanders, and Wilson that Scrivener on April 18, knew of the employees meeting with the field examiner and the identity of the men who were interviewed by the field examiner on the evening of April 17.

I conclude and find that Scrivener's questioning of Wilson and Sanders on April 18 concerning their meeting with a Board field examiner violated Section 8(a)(1) of the Act.

17. On the afternoon of Thursday, April 18, after finishing work, the men reported back to the shop. Scrivener told Don Cockrum, Wilson, Smith, and Sanders that he had no work for them and if something came in over the weekend he would call them. He asked if they wanted their checks to save them a trip on the following Friday morning. The four men said yes and Scrivener gave them their checks. Clyde Hunt, Jim Statton, and Perryman were not laid off by Respondent and worked thereafter.

Following this layoff Sanders was never called back to work. Smith and Wilson were called back on May 4 and as noted earlier "Don" Cockrum returned to work in the early part of June.

Thus, on April 18, Scrivener laid off the remaining four employees who signed union authorization cards, having previously laid off and not recalled Bill Cock-

rum. In contrast he retained on his payroll Perryman, the sole remaining employee of those employed when the union organization started, and Hunt and Statton, none of whom had any part in the union organization. In fact Hunt and Statton were obviously hired to replace some of the union-affiliated employees.

Scrivener's explanation of this layoff was that the other men were retained on jobs they had started and that he was short of work. Scrivener's explanation is not convincing. The fact is that the men were on jobs at the time and that there was some other work such as the apartment house still to be done. Further Scrivener assigned men to the jobs and could have made assignments so as to retain senior men if the amount of work available was decreasing. In making these layoffs Scrivener was retaining Statton, a man with apparently no previous experience who had been on the job less than a month while laying off more experienced helpers. Further the fact that a man had started a particular job would not seem to make any difference since the men would be following wiring diagrams in wiring a house or apartment and in any event a journeyman electrician should be capable of picking up a job at any point from any other journeyman. Certainly this was done at times when men were ill, as for instance on April 1, when Wilson was ill and advised Scrivener to call in Smith to work which Scrivener did. Certainly it would have been to Scrivener's benefit to retain more experienced helpers.

Scrivener is entitled to run his business in any manner he desires as long as it does not discriminate unlawfully against his men. His explanation as to why he laid these four men off was not clear or convincing and seems to be contrary to commonsense

and good business practice. In view of the parallelism of the union activities of these men and Scrivener's layoff of them, his reasons for the layoff are not sufficient to overcome the *prima facie* case presented by the General Counsel.

In determining motive and reaching this conclusion I have noted the circumstances of the prior discharges of his employees and Scrivener's being assured by his attorney that he was not subject to the jurisdiction of the Board. The men's union activities were not open or dramatic after that. Here a new event occurs, the Board field examiner is investigating the charge and even after the harsh discipline of discharge for daring to want a union of their choice, the men go to the union hall and discuss Scrivener's actions relating to the charge in interviews with the Board field examiner. Scrivener knowing of his employees meeting with the Board field examiner and being aware of the advice that he was not subject to Board jurisdiction, summarily laid off the remaining four employees in a rather evident attempt to demonstrate that he controlled their working conditions and to punish them for having the temerity to meet with and give evidence to the Board field examiner.

The circumstantial evidence of the event is sufficient to find that this is why Scrivener engaged in retaliation against his employees. It is not necessary that we have a confession from Scrivener to reach this result, nor that we have statements from him to indicate this is why he laid off these employees. The evidence of Scrivener's quick reaction to the concerted and union actions of his employees in the past in threatening to discharge and in discharging them, added to his hiring of new employees and his retention of them in subsequent layoffs in preference to the "union minded" employees, along with his quick

reaction in laying off the four employees prior to the end of the workweek and on the same day he determined they met with the Board field examiner and while there was work for them to do, plus his determination that he was not subject to the Board's jurisdiction, and his lack of credibility in testifying, is sufficient for me to find that at least one of his reasons, and I believe it was the main reason, for laying off these four men was in retaliation for their meeting with the Board agent to give testimony regarding the charges concerning them against Scrivener and further to discourage any other employees from so doing. The immediate parallel of the factual situation is too close to be coincidental.

Respondent states that these layoffs could not be found as violations of Section 8(a)(4),⁷ since the employees had not filed charges nor had they appeared in a Board proceeding and given testimony, and cites as his authority *N.L.R.B. v. Ritchie Manufacturing Company*, 354 F.2d 90 (C.A. 8).

With due deference to the Eighth Circuit, it appears that the Board has not so narrowly construed Section 8(a)(4) but has found that the Section is broad enough to encompass a situation such as this and I must follow the Board's line of decisions.

Section 8(a)(4) first comes into play when a charge is filed with the Board. Thus an individual filing a charge becomes protected by the Act and if he is thereafter discriminated against because he filed the charge, Section 8(a)(4) has been violated. In the instant situation the Union acting as the bargaining agent for the employees filed a charge in

⁷ Section 8(a)(4) provides that "it shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

their behalf alleging that three of them were discriminatorily discharged and that all of the employees were discriminated against by Respondent's refusal to bargain with the employees collective-bargaining agent. Thereafter the Board in exercising its statutory function sent a field examiner to secure facts concerning this charge to determine whether it had merit or not. The field examiner interviewed and discussed the charge and the jurisdictional aspects with Respondent Scrivener and thereafter interviewed the five union card signers and took affidavits from them so that the Regional Office might analyze the case to determine whether the charge had substance. I have found above that Respondent laid off these employees in retaliation for their meeting with and being interviewed by the field examiner and giving affidavits to him, all in furtherance of the Region's investigation of this charge.

I conclude and find Respondent's discharge or lay-off of these four individuals in these circumstances violated Section 8(a)(4) of the Act. To accept Respondent's theory of Section 8(a)(4) would be to place a premium on form rather than substance and what seems to be clear intent.. The four 8(a)(4) discharges were already the subject of a charge involving discharge of two of them and refusal to bargain as to all of them in that the union card signers constituted five-sixths of the bargaining unit at the time of the demand. The Union which was their bargaining agent filed the charge in their behalf. To follow Respondent's theory it would be necessary for each of these men to have signed the charge individually in his own name. Clearly, anything that a principal can do, an agent with authority can do for him, and here as the bargaining agent for these men, the Union had that authority.

Secondly, the protection afforded by Section 8(a) (4) would seem not meant solely for those who signed the charge but rather to be invoked at the time the charge is filed, so that employees who are called on for information by Board agents will not be discriminated against by their employers because they assisted the Board in the exercise of its statutory function of determining the merits of a charge. To suggest otherwise would be to say that the Board must investigate the factual background of charges and that a respondent is entitled to hinder that investigation by discharging each and everyone who appeared and talked to the Board agent, as long as the employee had not performed the ministerial act of signing a charge. Clearly where Congress gave the Board the authority to investigate and determine whether charges have merit, it intended that the Board not be hindered in so doing and established the filing of the charge as the initial guide post rather than as a *sine qua non*, for the protection of those who assisted the Board, sometimes reluctantly, in the performance of its statutory functions.

Thus my conclusion that Respondent violated Section 8(a) (4) rests on two points: (1) that the signer of the charge was the agent of these individuals and, (2) that Section 8(a) (4) must necessarily apply to employees who are interviewed by and give affidavits or statements to Board agents during the Board's exercise of its statutory function to investigate and determine the merits of charges filed with it.

The Board has in essence made such findings in several cases, the most recent of which is its affirmation of the Trial Examiner's decision in *Manila Manufacturing Co.*, 171 NLRB No. 151.

Respondent's brief contends that since the complaint says nothing about Wilson's termination on

May 10, the separation on that date cannot be contended as illegal.

According to Wilson's testimony, after being recalled on May 4, he worked until the close of business on May 10, when Scrivener told him there was no more work for him to do, that they were caught up and not to come back to work. Respondent's examination of Wilson would indicate that Respondent felt that Wilson had quit. However, Respondent offered no direct testimony which would demand such a conclusion.

The complaint alleges discharges of Wilson, along with others, on March 19 and 20 and April 18, as well as refusals to reinstate Wilson since on or about April 18. With Respondent's demonstrated union animus and crediting Wilson, I do not credit Respondent's claim that Wilson quit but determined that he was laid off once again and as is usual with layoffs is entitled to recall by Respondent, assuming here that the layoff was nondiscriminatory. In view of Respondent's past treatment of Wilson, I consider this short term employment by Respondent more in the nature of interim employment and not full and adequate reinstatement to which he and the others are entitled.

The problem of available work is one with which Respondent is intimately connected since Respondent was able by adjusting its bids on available work to either try to get it or not. Similarly Respondent apparently sought to subcontract the work it had on the apartment house to the Aton Luce Company. So in considering availability of work, there might be a question as to whether Respondent manipulated its work in order to have an apparent reason for laying off employees.

In regard to the 8(a)(3) allegations concerning the layoff of Bill Cockrum and George Smith on March 27 (13 above), and Respondent's refusal to reemploy Cockrum thereafter, I conclude and find that such refusals violated Section 8(a)(3) of the Act in that such layoffs were for the purpose of discouraging the employees' union activities and in retaliation for their selection of the Union as their bargaining agent. The same questions regarding available work may be raised here as were raised in regard to the layoffs on April 18, which I have resolved against Respondent. Here Respondent again had the authority to assign the men to jobs and chose to retain nonunion men in preference to those it knew supported the Union. Respondent's reasons for so acting in the face of a *prima facie* case are not convincing.

In regard to the 8(a)(4) allegations of the complaint, I conclude and find that Respondent discriminatorially laid off employees Donald Cockrum, Albert Wilson, George Smith, and Claude Sanders on April 18, 1968, in violation of Section 8(a)(4) and (1) of the Act, and that since April 18, 1968, Respondent has failed and refused to reemploy Claude Sanders in any manner in violation of Section 8(a)(4) and (1) of the Act, and I am not satisfied that it has fully and adequately reinstated Wilson or Smith. This latter is a question for the compliance stage of this case, but I make no finding that either of them has been adequately reinstated.

The findings of violations of Section 8(a)(1), (3), and (5) herein are made on the basis that having taken jurisdiction of this case because of the violations of Section 8(a)(4), the Board should exercise its jurisdiction in remedying any and all violations found.

C. The Refusal to Bargain

The events set forth above demonstrate amply that the Union made a demand for recognition backed up by a display of authorization cards on March 19 and requested Respondent to bargain. It is clear that Respondent refused to bargain with the Union, even after seeking and getting confirmation of the Union's majority in an unlawful manner from its employees. I find that the unit composition as of that date consisted of Smith, Wilson, Sanders, Perryman, and the two Cockrums. At the time of the demand Clyde Hunt had not been hired and from the threats made to the employees concerning discharge and the discharges that followed, it is natural to assume that Hunt was hired to replace one of the journeymen. Scrivener was preparing to discharge. Clearly Statton had not yet been employed. Claybaugh could not come under any definition of a regular employee and neither could Albert Hunt who was probably not employed by Respondent until after the end of the school year and certainly after his father had begun work with Respondent.

Respondent also contends that Scrivener had a legitimate good-faith doubt concerning the validity of the authorization cards shown him by the Union in the morning of March 19. Scrivener testified that on looking at the cards he felt that the writing on several of them looked the same and he doubted their genuineness. Further he stated "I told Mr. Moore that I did not believe those were those boys' signatures. I did not think that they had signed those cards or I would have heard something about them signing them." Later in his testimony Scrivener denied that he had raised a question with Moore as to the genuineness of the signatures. When asked what he said to

Moore about the cards he answered "I did not say anything about the cards to the best of my knowledge." Scrivener testified once more that he did not say a word to Moore about the genuineness of the cards and said that he did not attempt to find out from the employees whether they signed the cards. He continued to maintain that his doubt that the Union had a majority, was based on his assessment that the signatures were not genuine.

Bill Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders identified the unambiguous authorization cards and testified they were told that the purpose in signing the cards was to authorize the Union to represent them, and that the cards would be shown to Scrivener as proof of the union's authority to bargain for the employees and that if he did not recognize the Union, the cards could be used for filing a petition for an election. The fifth employee, "Don" Cockrum, testified somewhat differently but finally testified that he was told that the cards would be shown to Scrivener to show that the Union represented the employees. I credit the version of the four men and discredit "Don" Cockrum's contrary testimony.

I conclude and find that March 19 is the appropriate date for determining majority and on that date the Union represented the majority of Respondent's employees in an appropriate unit, made a demand on Respondent for recognition and requested that Respondent enter into collective bargaining with it.

Respondent refused to bargain then or thereafter with the Union and I conclude and find that such a refusal violated Section 8(a)(5) of the Act.⁸ Respondent's claim of a good-faith doubt that the employees had signed the union authorization cards is

⁸ See *Wilmington Heating Service, Inc.*, 173 NLRB No. 15.

shown false by the events and testimony including Scrivener's contradiction of himself as to whether or not he raised such a doubt to the union representatives at the time he was shown the cards (I have found that he did not).. Moreover if there were ever any such doubt, the employees resolved it for him when he questioned them that morning about their joining the Union. If Scrivener had any doubts as to the validity of the signatures, he was not in good faith but was on the basis that he was surprised that his employees did not tell him about it before signing the authorization cards with the Union, since he thought he had them talked into joining the Union of his choice. Further Scrivener sought to undermine the Union by telling Sanders and others that the Union said they would replace the men as soon as a contract was signed, seeking to get them to disavow their union allegiance. Scrivener hired Hunt as a replacement for one of the journeymen that day in anticipation of discharging some of the union adherents. Again the fact that the Union represented a majority was clearly demonstrated to Scrivener by the men themselves both on the jobsite and that evening when in response to his urging they appeared at the shop and were lectured by Respondent's attorney and still maintained their allegiance to the Union demonstrating clearly that the Union represented them.

From the facts and from his testimony Scrivener evidently was disturbed by this turn of events to the point where he raised some question as to whether the men could have meant to do this to him, taking it as a personal affront that they joined the Union.

In these circumstances, I cannot find the Respondent had a good-faith doubt as to the Union's majority but must find that his doubt, if any, was in bad faith and that he acted in bad faith by thereafter attempt-

ing to undermine the Union and get the men to reverse their stand by embarking on a campaign of 8(a) (1) and (3) violations.

III. The Effects of the Unfair Labor Practices Upon Commerce

The activities of Respondent as set forth in Section II, above, and particularly those actions found violative of Section 8(a) (4) of the Act, together with the acts herein found in violation of Section 8(a) (1), (3), and (5) of the Act, occurring in connection with the Respondent's business operations as set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The Remedy

Having found that Respondent engaged in the unfair labor practices set forth above (it is recommended that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act as follows:

Since Respondent on and after March 19, 1968, and at all times since they has refused and still refuses to bargain with the Union as the representative of its employees in an appropriate unit, it is recommended that Respondent, upon request, bargain collectively with the Union and in the event that an understanding is reached, embody such understanding in a signed agreement.

Respondent having discharged Donald Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders on or about April 18, 1968, in violation of Section 8(a) (4)

of the Act and Respondent having discharged William Cockrum, Wesley Smith, and Albert Wilson on March 19 and 20 and further having laid off employees William Cockrum and George Smith on March 27, 1968, and not having reinstated employees William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith all in violation of either Section 8(a) (3) or (4) of the Act, I recommend that Respondent offer them immediate and full reinstatement to their former positions or if those positions are unavailable due to a change in Respondent's operations then to a substantially equivalent position without prejudice to their seniority or other rights and privileges. Respondent shall make them whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them by payment to them of a sum equal to that which each would have received as wages from the dates of their discharge or layoffs until the date Respondent reinstates them less any net interim earnings. Backpay is to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, with interest at the rate of 6 percent per annum to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. I further recommend that Respondent make available to the Board, upon request, payroll and other records in order to facilitate checking the amounts of backpay due and the rights of each of these employees.

Respondent has also interfered with its employees' rights by encouraging them to join another labor organization, interrogating them concerning their union activity and their meeting with an agent of the Board, and by threatening them with loss of employment because of their union activity and further threatening to blackball them from other jobs because of their union activity.

Having found that Respondent has broadly disregarded its employees' rights by its refusal to bargain, by its discharges and layoffs, by its violations of Section 8(a)(1), and by its violations of Section 8(a)(4) has violated the basic rights provided by the Act, I am of the opinion that Respondent probably might commit other unfair labor practices unless it is broadly enjoined from so doing. Since part of the purpose of the Act is to prevent the commission of further unfair labor practices, I recommend that Respondent be placed under a broad order to cease and desist from in any other manner infringing upon the rights guaranteed its employees by the Act.

On the basis of the foregoing findings and the entire record in this matter I make the following:

Conclusions of Law

1. Robert Scrivener, d/b/a A A Electric Co. is an employer affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All employees employed by the Respondent excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times since March 18, 1968; the Union has been and now is the exclusive representative of the employees in the said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. Respondent, by refusing to bargain with the Union on and after March 19, 1968, as the exclusive representative of its employees in the appropriate unit set forth above, has engaged in and is en-

gaging in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

6. Respondent, by discriminatorily laying off or discharging employees Albert Wilson, Donald Cockrum, Claude Sanders, and Wesley Smith on April 18, 1968, and thereafter refusing to reinstate Wilson, Sanders, and Smith because they were interviewed by, and gave testimony to, an agent of the Board conducting an investigation of the charges in this case, violated Section 8(a)(4) of the Act, and thereby engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(4) and (1) and 2(6) and (7) of the Act.

7. Respondent, by discriminatorily discharging William Cockrum, Wesley Smith, and Albert Wilson on March 19 and 20, 1968, and by discriminatorily laying off employees William Cockrum and Wesley Smith on March 27, 1968, and by refusing thereafter to reemploy William Cockrum all because of the union sentiments, membership, and activities of these employees, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(3) and (1) and 2(6) and (7) of the Act.

8. Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act by: (a) encouraging employees to join a labor organization of Respondent's choice; (b) polling, or causing a poll to be taken of its employees in order to ascertain their union sympathy; (c) interrogating employees concerning their union activity; (d) interrogating employees concerning their meeting with and being interviewed by an agent of the Board; (e) threatening employees with loss of em-

ployment on account of their union activity; and (f) threatening employees with blackballing them from other employment because of their union activity.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this case considered as a whole, it is recommended that Robert Scrivener, d/b/a A A Electric Co. of Springfield, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging employees to join a labor organization of Respondent's choosing.

(b) Polling, or causing its employees to be polled, in order to ascertain their union activity.

(c) Interrogating its employees concerning their union activity.

(d) Interrogating employees concerning their meeting with, and being interviewed by, an agent of the Board.

(e) Threatening employees with loss of employment on account of their union activity.

(f) Threatening employees with blackballing them from other employment because of their union activity.

(g) Refusing to bargain collectively in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Local 453, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of the employees in the appropriate unit described in paragraph 3 of the section above entitled "Conclusions of Law."

(h) Discouraging membership in and activities on behalf of Local 453, International Brotherhood of Electrical Workers Union, AFL-CIO, by discriminatorily discharging or laying off and not reinstating its employees.

(i) Discouraging employees from being interviewed by an agent of the Board or cooperating with the Board in its investigation of charges against the employer, by discriminatorily discharging and not reemploying its employees.

(j) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization to form labor organizations, to join or assist Local 453, International Brotherhood of Electrical Workers, AFL-CIO, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all the employees in the appropriate unit and embody in a signed agreement any understanding reached.

(b) Offer to William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith reinstatement in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(c) Make Donald Cockrum, William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, contracts and contract bids, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(e) Notify Donald Cockrum, William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(f) Post at its Springfield, Missouri, shop and office, copies of the attached notice marked "Appendix."* Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 17, in writing, within 20 days from the receipt of this

* In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

Decision, what steps have been taken to comply herewith.¹⁰

Dated at Washington, D.C.

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

Following a trial in which the Company, the Union, and the General Counsel of the National Labor Relations Board participated and offered their evidence, it has been found that we violated the National Labor Relations Act and we have been ordered to post this notice and to abide by what we say in this notice.

WE WILL NOT ask you what union you want to join nor try to get you to join a union we want.

WE WILL NOT ask you about your union activities.

WE WILL NOT ask you about any meeting you may have with an agent of the National Labor Relations Board.

WE WILL NOT threaten you with loss of your jobs because of your union activities.

¹⁰ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

WE WILL NOT threaten to blackball you from other work because of your union activities.

WE WILL NOT interfere with your right to file charges against us or be interviewed by or give affidavits to agents of the National Labor Relations Board by laying off or discharging employees because they do so.

WE WILL NOT try to discourage you from becoming or being members of Local 453, International Brotherhood of Electrical Workers, AFL-CIO, by unlawfully firing or laying off any of our employees.

WE WILL bargain collectively, upon request, with Local 453, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached, WE WILL sign a contract containing such understanding. The unit is:

All employees, excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer Donald Cockrum, William Cockrum, Claude Sanders, Wesley Smith, and Albert Wilson their former jobs with all of their rights and any backpay due them.

WE WILL notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the

Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

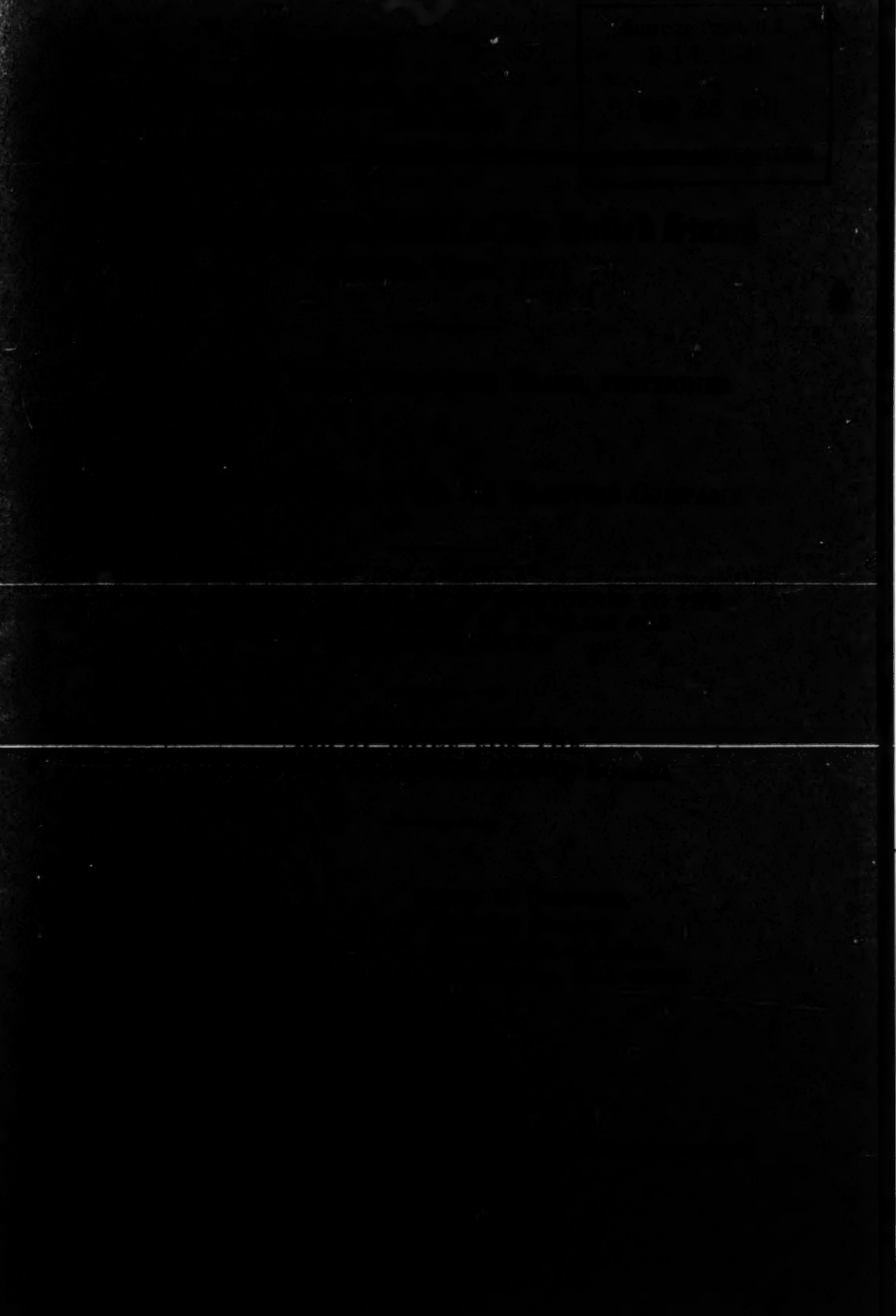
All our employees are free to become or remain union members.

ROBERT SCRIVENER, d/b/a
A A ELECTRIC Co.
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106, Telephone 816—FR4-5181.



In the Supreme Court of the United States
OCTOBER TERM, 1971

No. 70-267

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBERT SCRIVENER, d/b/a AA ELECTRIC COMPANY

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

**REPLY BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

1. Respondent's brief in opposition erroneously states the factual setting in which this case arose. Its version of the facts (Br. pp. 2-6, 11-14, 30) repeatedly ignores credited evidence and relies on testimony discredited by the Trial Examiner and the Board.¹ Thus, the testimony credited by the Trial

¹ There is no evidence to support respondent's claim (Br. pp. 4-5, 31) that the Section 8(a) (4) allegations against it were "trumped-up" by a Board agent, who assertedly interviewed the dischargees because he hoped to "lay a foundation" for a charge that respondent had violated that section.

Examiner established that President Scrivener knew of the employees' meeting with the Board field examiner, and initiated a discussion of that matter, before he discharged them (Pet. App. D, pp. 51-53; A. 74, 91). The Board accepted this credibility resolution, concluding that, "[a]s found by the Trial Examiner and established by the record," respondent discharged four employees "in retaliation against them for having met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against Respondent" (Pet. App. D, pp. 20-21).

2. Respondent contends that its retaliatory discharge of these four employees did not violate Section 8(a)(1) and (4) of the Act because the Act protects only employee "testimony", i.e., "oral evidence presented in a formal Board proceeding where all parties are present, have an opportunity to cross-examine and present their own testimony" (Br. p. 19). In support of this contention, respondent argues that "[i]t would be absurd to construe Section 8(a)(4) as forbidding an employer from discriminating against an employee for making statements to an NLRB investigator in informal pre-complaint investigation," since the employer ordinarily would not know what an employee might have told the investigator and would have no reason to discharge the employee for statements that might well be favorable to the employer (Br. pp. 24-26).

This argument misconceives the fundamental policy underlying Section 8(a)(4). Congress intended

this provision to assure that an employee would "be *completely free* from coercion against reporting [information about unfair labor practices] to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (emphasis supplied). There was concern with more than merely protecting employees against employer reprisals for having given testimony unfavorable to the employer; the basic objective was to keep free and unimpeded the channels of communication between employees and the Board and to dispel any fear on the part of employees that they risked reprisals by employers by cooperating with the Board in the investigation and trial of unfair labor practice charges, irrespective of the nature of the information they gave to the Board. The investigation by the Board is as important to the unfair labor practice proceeding as is the filing of a charge or the formal hearing. The legislative purpose requires that Section 8(a)(4) be construed to protect an employee who participates in the investigative process.

3. Nor is there substance to respondent's contention (Br. p. 15) that the Board failed to find that the discharges of the employees for participation in the Board's investigation also violated Section 8(a)(1) of the Act. The Board specifically found that "Respondent's conduct falls within the prohibitions of Section 8(a)(1) and (4) of the Act" (Pet. App. D, p. 21). The dismissal of the complaint pertained

only to allegations of "independent and unrelated violations of Section 8(a)(1), (3), and (5) of the Act" (Pet. App. D, p. 23).

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1971.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-267

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBERT SCRIVENER, D/B/A AA ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 281-282) is reported at 435 F. 2d 1296. The decision and order of the National Labor Relations Board (A. 216-248, 272-278) are reported at 177 NLRB No. 65.

JURISDICTION

The judgment of the court of appeals (A. 283) was entered on January 6, 1971, and the Board's timely petition for rehearing *en banc* was denied on February 26, 1971 (A. 284). On May 19, 1971, Mr. Justice Blackmun extended the time for filing a petition for

a writ of certiorari to and including June 26, 1971. The petition was filed on June 11, 1971, and was granted on October 12, 1971 (A. 285). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer's discharge of an employee because he has given a written statement to a Board agent during the investigation of an unfair labor practice charge violates Sections 8(a)(4) and 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right * * * to form, join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Respondent (the "Company") is an electrical contractor engaged in residential and commercial construction in Springfield, Missouri (A. 218, 220-221; 10, 11, 132). On March 18, 1968, five of the Company's six employees signed cards authorizing Local 453, International Brotherhood of Electrical Workers, AFL-CIO (the "Union") to represent them for collective bargaining (A. 255-256; 6-8, 19, 50, 59, 78, 85).¹ The following day, Union Representative Moore advised Company President Robert Scrivener of the Union's majority status and asked to negotiate a contract (A. 266; 9). Scrivener examined the cards and refused the Union's request (A. 226; 10).

Scrivener then visited his several jobsites, complained to the employees about their signing of union cards, and indicated that this could lead to their discharge (A. 228-230; 20, 60, 79). On March 20, he dismissed card signers Bill Cockrum, Smith, and Wilson (A. 231; 22, 51, 62). The same day, Scrivener hired two new employees, Hunt, a journeyman, and Statton, a helper (A. 150).

The following day (March 21) the Union filed charges with the Board, alleging that the Company had violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act (A. 232; 170). On March 26, Scrivener per-

¹Cards were signed by employees Bill and Don Cockrum, Smith, Wilson, and Sanders (A. 225-226; 19, 50, 59, 78, 85). Employee Perryman was the sole nonsigner (A. 226; 60).

mitted the three discharges to return to work. The next day he again released Bill Cockrum and Smith, on the ground that there was a lack of work; however, three junior employees—Perryman, the sole nonsigner among the original employees, and the two new employees, Hunt and Statton—were retained (A. 232; 25, 26, 52, 152, 157). Smith was recalled on April 1, and along with the other card signers except Bill Cockrum, who was not recalled, continued to work until April 18 (A. 232; 26).

On April 17, a field examiner from the Board's Regional office met with President Scrivener and discussed the charges filed on March 21 (A. 223; 65). That evening, the examiner interviewed the five card signers—Bill and Don Cockrum, Smith, Sanders and Wilson—at the Union hall, and received sworn statements from the last four (A. 233; 26-27, 64, 80, 88-89, 187-188). The following day, Scrivener asked Wilson, "Did you guys meet with the Labor Board last night?" When Wilson said he had, Scrivener said, "They sure don't talk much do they?" Wilson replied "no" and left to gather material for a job. (A. 233; 65.) Later, while Wilson and Don Cockrum were getting ready to go out, Scrivener again said, "You say you met with the Labor men last night?" Wilson replied "Till about 11 or 11:30," and Scrivener then added, "That old boy sure don't tell you nothing." (A. 233; 65.) Scrivener also questioned Sanders while he was at the shop getting ready to go to work that day (April 18), asking him, "Did the boys find out anything last

night?" Sanders answered, "Not that I know of." (A. 233; 80.)²

When the men reported back to the shop at the end of work on April 18, Scrivener dismissed Don Cockrum, Smith, Wilson, and Sanders with the explanation that he had no work for them to do (A. 234; 27, 65-66, 80-81, 96). Perryman, Statton, and Hunt continued to work. At this time the Company had substantial work to complete in at least three houses and one 11-unit apartment dwelling. (A. 235; 28, 97-98, 188.)

The Union filed an amended charge on May 13, 1968, adding the allegation that the dismissals of Don Cockrum, Smith, Wilson, and Sanders on April 18 were because they had given the statements to the examiner in connection with the earlier charge and that this action violated Sections 8(a)(1) and 8(a)(4) of the Act (A. 173).³ A complaint was issued on both the earlier charge and the added allegation (A. 175).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Company's operations, while too small to satisfy the Board's self-imposed jurisdictional standard for unfair labor practice

² The Examiner credited the testimony of Sanders and Wilson and rejected Scrivener's claim that he had no knowledge whether the men talked to a Board field examiner until April 20 (A. 233-234). The Board accepted the Examiner's findings on this matter (A. 273).

³ Sanders was never recalled (A. 234; 84). Smith and Wilson returned to work on May 4, and Don Cockrum in early June (A. 234; 29, 73).

cases,⁴ were sufficiently extensive to "have an impact on and affect interstate commerce" and thus were "within the statutory jurisdiction of the Board" (A. 272-273). It concluded, in agreement with the Trial Examiner, that the April 18 dismissals of employees Don Cockrum, Smith, Wilson, and Sanders were "in retaliation against them for having met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against [the Company]" (A. 273);⁵ and that this interference with the investigation—"an integral and essential stage of Board proceedings"—violated Sections 8(a)(1) and 8(a)(4) of the Act (*ibid.*). "In these circumstances, public policy requires the Board to assert jurisdiction for the purpose of remedying

⁴ The Board's standard requires that an employer furnish goods and services or purchase materials which move in interstate commerce, totalling at least \$50,000 a year. *Siemons Mailing Service*, 122 NLRB 81, 85. Though the Company did not meet that standard, it obtained a substantial amount of supplies from out-of-state. During the previous year (1967), it purchased more than \$23,000 of materials from just one of its suppliers, about 90 percent of which originated from outside the State of Missouri; for 1968, its projected purchases of interstate goods from this supplier exceeded \$30,000 (A. 218-219, 273).

⁵ The Trial Examiner based his finding of unlawful motivation on credited testimony showing that on April 18 President Scrivener knew of the employees' meeting with the field examiner and the identity of the men who were interviewed by him (A. 234), and Scrivener's "quick reaction in laying off the four employees prior to the end of the workweek and on the same day he determined they met with the Board field examiner and while there was work to do" (A. 236); the Examiner also noted Scrivener's "lack of credibility in testifying" (*ibid.*).

the [Company's] unlawful interference with the statutory right of all employees freely to resort to and participate in the Board's processes" (A. 274). Accordingly, the Board ordered the Company to cease and desist from the Sections 8(a)(1) and 8(a)(4) unfair practices, to reinstate the dismissed employees with back pay, and to post the usual notices (A. 275-276).^{*}

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals declined to enforce the Board's order. In a *per curiam* opinion, it held, on the authority of its earlier decision in *National Labor Relations Board v. Ritchie Manufacturing Co.*, 354 F.2d 90, that Section 8(a)(4) does not "encompass discharge of employees for giving written sworn statements to field examiners" (A. 282). It also refused to find that the discharges independently violated Section 8(a)(1), since "[t]o do so would be to overrule *Ritchie* implicitly, and we are not prepared to take that action" (*ibid.*).

SUMMARY OF ARGUMENT

Under Section 8(a)(4) of the National Labor Relations Act, it is an unfair labor practice for an em-

^{*} The Trial Examiner also found that the Company had engaged in other conduct which violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act, and recommended that the Board remedy these violations, too. However, the Board concluded (with one member dissenting) that it would not effectuate the policies of the Act to assert its jurisdiction over these "independent and unrelated" violations, and dismissed those portions of the complaint (A. 274-275).

ployer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act * * *." By enacting Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238. To achieve that objective, Section 8(a)(4) must be construed to protect employees from employer retaliation not only where they have filed a charge or actually given testimony at a formal Board hearing, but also where, as in this case, they have given a statement to a Board agent during an investigation of unfair labor practices. This interpretation of Section 8(a)(4) comports with the Board's long-standing view and the legislative history, and is supported by the Board's subpoena powers under Section 11 of the Act and the protections that apply there. The courts of appeals for other circuits uniformly have construed Section 8(a)(4) liberally to effectuate fully the remedial purpose behind it, and to protect employee participants in Board investigations who have given statements but have not filed charges or formally testified.

The dismissals here also independently violated Section 8(a)(1) of the Act. Under that section, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 protects the employees' right "to form, join, or assist labor organizations * * * and to engage in other concerted

activities for the purpose of collective bargaining or other mutual aid or protection." This guarantee includes the right of employees to participate in the Board's administrative processes, and, to give information to it and to have other employees do the same. If their employer discharges them for doing so—as in the present case—this restrains them from freely exercising their Section 7 rights.

ARGUMENT

AN EMPLOYER'S DISCHARGE OF AN EMPLOYEE BECAUSE HE HAS GIVEN A WRITTEN STATEMENT TO A BOARD AGENT DURING THE INVESTIGATION OF AN UNFAIR LABOR PRACTICE CHARGE VIOLATES SECTIONS 8(a)(4) AND 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT.

The Board, on the basis of the testimony credited by the Trial Examiner, found that the Company terminated four employees because they had given affidavits to a Board field examiner in connection with his investigation of unfair labor practice charges which had been filed against the Company. The court of appeals rejected the Board's holding that this interference with Board investigative processes violated Sections 8(a)(4) and 8(a)(1) of the Act, ruling, in effect, that the Act affords employees no protection against reprisal for such participation in a Board investigation. In the court's view, the Act protects an employee against reprisal only for filing a charge or giving testimony at a formal hearing.

NCR



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CARD

8

A. SECTION 8(a)(4)

1. Under Section 8(a)(4), it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act * * *." We submit that this section covers not only the filing of charges and testifying, but also the giving of written statements to Board agents during a Board investigation of unfair labor practices. All three types of conduct are essential to the proper performance of the Board's duties, and Congress intended to protect all of them from employer retaliation. Thus, where, as in this case, an employee gives a Board agent a sworn statement in connection with an investigation of unfair labor practice charges and his employer dismisses him because of his doing so, Section 8(a)(4) has been violated.

This interpretation comports fully with the section's manifest objective. As this Court recently noted, by enacting Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238. Such freedom is necessary "to prevent the Board's channels of information from being dried up by em-

² There is no evidence to support respondent's claim (Br. in Opp. pp. 4-5, 31) that the Section 8(a)(4) allegations against it were "trumped up" by a Board agent, who assertedly interviewed the discriminatees because he hoped to "lay a foundation" for a charge that respondent had violated that section.

ployer intimidation of prospective complainants and witnesses." *John Hancock Mutual Life Ins. Co. v. National Labor Relations Board*, 191 F. 2d 483, 485 (C.A. D.C.). The basic aim was to keep free and unimpeded the channels of communication between employees and the Board and to dispel any fear by employees that they risked employer reprisal by cooperating with the Board in the investigation and trial of unfair labor practice charges, irrespective of the nature of the information they give to the Board or the manner in which they do so.⁸

The legislative purpose indicates that the protections afforded by Section 8(a)(4) were not intended, as the court below stated in its earlier *Ritchie* decision and reiterated here, to be limited only to employees who have "actually testified at a hearing," and thus not "cover preliminary preparations for giving testimony" (354 F.2d at 101). For a preliminary prepara-

⁸ Respondent contends that "[i]t would be absurd to construe Section 8(a)(4) as forbidding an employer from discriminating against an employee for making statements to an NLRB investigator in informal pre-complaint investigation," since the employer ordinarily would not know what an employee might have told the investigator and would have no reason to discharge the employee for statements that might well be favorable to the employer. (Br. in Opp., pp. 24-26). This argument misconceives the fundamental policy underlying Section 8(a)(4). There was concern with more than merely protecting employees against employer reprisals for having given testimony unfavorable to the employer. Congress intended by this section to assure that an employee would "be completely free from coercion against reporting * * * [information about unfair labor practices] to the Board" (*Nash, supra*, 389 U.S. at 238, emphasis supplied).

tion, including investigating and obtaining statements from employees, is no less essential a part of the administrative process than the other steps that are admittedly covered by the section, the filing of charges that initiate the investigation and the formal hearing that follows.

Section 8(a)(4) must, therefore, be construed to protect an employee participating in the investigative process from employer retaliation for his having done so, irrespective of whether the employee filed a charge or actually gave testimony at a formal hearing. The phrase "given testimony" in Section 8(a)(4) is sufficiently broad to support this conclusion, particularly in light of the purpose that this section was intended to serve. Cf. *National Labor Relations Board v. Wyman Gordon Co.*, 394 U.S. 759, where this Court held that "evidence" as used in Section 11 of the Act "means not only proof at a hearing but also books and records and other papers which will be of assistance to the Board in conducting a particular investigation" (394 U.S. at 768, footnote omitted).¹

2. This interpretation of Section 8(a)(4) accords with the Board's long-standing view and the practicalities of agency action in this area.

Section 8(a)(4) had its origin in the National Industrial Recovery Act. Executive Order 6711-B under that Act (X NRA Codes 895, issued May 15, 1935) provided that "No employer subject to a code of fair competition approved under [the National Industrial Recovery Act] shall dismiss or demote any employee for making a complaint or giving evidence with respect

to an alleged violation of the provisions of any code of fair competition approved under said title" (emphasis supplied). The first National Labor Relations Board interpreted the italicized phrase to protect not only the act of testifying at a formal Board hearing, but also any "giving" of information relative to violations of the National Industrial Recovery Act. See *Matter of New York Rapid Transit Corp.*, 1 NLRB 192, 193 (1934) (discharge of four employees because they gave affidavits to the Board's New York Regional Office in connection with the investigation of charges that their employer had violated the NIRA); *Matter of Ralph A. Freundlich*, 2 NLRB 147, 148 (1935) (discharge of an employee who had testified against his employer in a state court action to enforce a bargaining agreement).

While Section 8(a)(4) now reads "testimony," rather than "evidence," there is nothing in the legislative history suggesting that this change was intended to diminish the broad protection previously accorded, so as to expose employees to reprisals if their testimony is given through an affidavit during an investigation rather than as a witness in a formal hearing. To the contrary, a Senate Labor Committee memorandum described the new language as "merely a reiteration" of the provision found in Executive Order 6711-B, and added that the "need for this provision is attested" by the Board decisions cited above. See, Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress), Senate Committee Print, p. 29, 1 Legislative History of the National Labor

Relations Act (1935), at p. 1355. There is no sound reason why Congress would have wanted to contract the scope of the protection employees previously had.*

No other result would square with the practicalities of agency action in this area. An employee participating in a Board investigation often is not called to testify at a formal Board hearing. This may be because his testimony is cumulative, or because, as happens frequently, the case is settled or dismissed before hearing (see *Thirty-fifth Annual Report of the National Labor Relations Board*, 169 (G.P.O. 1971)). Or, as happened here, the employee may be discharged as soon as the employer learns that he has participated in the investigation, and long before a formal Board hearing at which he could testify has started. If the employer may punish the employee for giving a statement in the investigation—which is the effect of the Eighth Circuit's narrow construction of Section 8(a)(4)—employees will be much less

* In the court below as well as before the Board, respondent relied on *Ogle Protective Service*, 149 NLRB 545. In that case, the Trial Examiner concluded that the discharge of an employee violated Section 8(a)(3), but declined to find that, because the employee was under subpoena to testify at a Board hearing when discharged, the discharge also violated Section 8(a)(4). “[s]ince the discrimination does not come within the precise language of Section 8(a)(4)” (*id.* at 566). However, no exceptions were filed to the Examiner's decision and the Board adopted it *pro forma* (*id.* at 546, n. 2)—that is, without passing on its propriety. Where the Board itself has dealt with the scope of Section 8(a)(4), it has consistently held that it extends to and protects employee participation in the entire investigative process, not just actually filing charges or testifying at a hearing.

willing to cooperate in Board investigations, thus significantly impairing the Board's effectiveness in carrying out its duties.

3. Section 11 of the Act (29 U.S.C. 161) also supports this interpretation of Section 8(a)(4). Under Section 11 the Board is empowered to issue subpoenas "[f]or the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it." Subpoenas so issued may require "the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation."¹⁰ Persons subpoenaed in connection with (and their resulting participation in) Board investigations are entitled to protection under Section 8(a)(4) from employer retaliation on that account regardless of whether they have actually filed charges or testified at a formal Board hearing, since "Congress intended the protection [under Section 8(a)(4)] to be as broad as the power [under Section 11]." *Pedersen v. National Labor Relations Board*, 234 F. 2d 417, 420 (C.A. 2).

In the present case, had the employees refused to give statements to the Board's investigator voluntarily, the Board could have compelled them to do so under Section 11, in which event, under the reasoning of *Pederson, supra*, Section 8(a)(4) would have been fully applicable to protect them from employer discrimination for having done so. There is no basis for

¹⁰ See, generally, *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 768; *National Labor Relations Board v. Barrett Co.*, 120 F. 2d 583 (C.A. 7); *National Labor Relations Board v. Anchor Rome Mills*, 197 F. 2d 447 (C.A. 5).

denying similar protections to a voluntary participant; whose acts in all other respects are the same as the employee who is subpoenaed.

4. The courts of appeals for the other circuits uniformly have construed Section 8(a)(4) liberally so as to effectuate fully the remedial purpose behind it. Thus, the Fifth Circuit in *M & S Steel Company v. National Labor Relations Board*, 353 F. 2d 80, summarily sustained the Board's finding (148 NLRB 789, 795) that an employer violated Section 8(a)(4) by discharging an employee because he gave an affidavit to a Board agent investigating an unfair labor practice charge. In *National Labor Relations Board v. Dal-Tex Optical Co., Inc.*, 319 F. 2d 58, 59 (C.A. 5), that court enforced a Board determination (131 NLRB 715, 721, 729-739) that the discharge of an employee, because he appeared (but did not testify) at a Board hearing, violated Section 8(a)(4). The courts of appeals also have read Section 8(a)(4) broadly in other contexts to achieve the legislative objective embodied therein.¹¹

¹¹ See, e.g., *National Labor Relations Board v. Eastern Mass. Street Railway Co.*, 235 F. 2d 700 (C.A. 1), certiorari denied, 352 U.S. 951, enforcing 110 NLRB 1963, 2046 (refusal to reinstate an employee because he was named in a charge filed by the union); *National Labor Relations Board v. Darling & Co.*, 420 F. 2d 63, 66 (C.A. 7) (denial of severance pay to employees because their union representative had filed a charge); *National Labor Relations Board v. Gibbs Corp.*, 308 F. 2d 247 (C.A. 5), enforcing, 131 NLRB 955 (discharge of employees who their employer believed were supporting charges filed by a fellow employee); *Pedersen v. National Labor Relations Board*, 234 F. 2d 417, 420 (C.A. 2) (discharge of a supervisor for giving testimony); *National Labor Relations Board v. Syracuse*

B. SECTION 8(a)(1)

Under Section 8(a)(1), it is unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." Section 7 guarantees employees the right "to form, join or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." This guarantee includes the right of employees to participate in the administrative processes of the Board and to give information to it. If their employer discharges them for doing so—as in the present case—this restrains them from freely exercising their Section 7 rights. Thus, apart from Section 8(a)(4), the discharges here violated Section 8(a)(1).¹²

Stamping Co., 208 F. 2d 77, 79-80 (C.A. 2). (refusal to re-hire a laid-off employee because she filed a charge); *John Hancock Mutual Life Insurance Co. v. National Labor Relations Board*, 191 F. 2d 483 (C.A. D.C.) (refusal to hire a job applicant for giving testimony). But cf. *Hoover Design Corporation v. National Labor Relations Board*, 402 F. 2d 987 (C.A. 6), where the court held that a discharge because the employee threatened to file unfair labor practice charges with the Board did not violate Section 8(a)(4), citing in support the *Ritchie* case.

¹² There is no substance to respondent's contention. (Br. in Opp., p. 15) that the Board failed to find that the termination of the employees for participating in the Board's investigation also violated Section 8(a)(1) of the Act. The Board specifically found that "Respondent's conduct falls within the prohibitions of Section 8(a)(1) and (4) of the Act" (A. 273). The dismissal of the complaint pertained only to allegations of "independent and unrelated violations of Section 8(a)(1), (3), and (5) of the Act" (A. 275).

It is firmly established that "employees have a right to have their privileges secured by the Act vindicated through the effective administrative proceedings provided by Congress." *Oil City Brass Works v. National Labor Relations Board*, 357 F. 2d 466, 471 (C.A. 5). Accord, *King Radio Corp. v. National Labor Relations Board*, 398 F. 2d 14, 22 (C.A. 10); *National Labor Relations Board v. Southland Paint Co.*, 394 F. 2d 717, 721 (C.A. 5); *National Labor Relations Board v. Electro Motive Mfg. Co.*, 389 F. 2d 61, 62 (C.A. 4); compare *National Labor Relations Board v. Marine Workers*, 391 U.S. 418. For the proceedings to be "effective," there must be witnesses (including employees) willing to give the Board information "without fear of being penalized by their employer" (*Oil City Brass Works, supra*, 357 F. 2d at 471). Section 8(a)(1) stands as a primary safeguard of the privileges secured by the Act, and prohibits employer reprisals against employees because of their participation in Board investigations.

This is the underlying rationale of numerous decisions by courts of appeals sustaining this interpretation of Section 8(a)(1). Thus, employer discrimination against supervisory personnel for testifying at a Board hearing violates Section 8(a)(1), though supervisors generally are not covered by the Act, since discrimination in this circumstance directly infringes the rights of rank-and-file employees to needed information and an effective administrative proceeding. See the *Oil City*, *King Radio*, *Southland Paint*, and *Electro Motive* cases, *supra*. In *Southland Paint* and

Electro Motive, as in the present case; the "testimony" was in the form of an affidavit. "The giving of an affidavit in the course of a Board proceeding is equivalent to giving testimony" (*Southland Paint, supra*, 394 F. 2d at 721).

Section 8(a)(1) is also violated where an employer questions employees about the contents of statements given to Board agents and demands copies. *Texas Industries, Inc. v. National Labor Relations Board*, 336 F. 2d 128 (C.A. 5). The court explained (*id.* at 134): "In order to assure the vindication of employee rights under the Act, it is essential that the Board be able to conduct effective investigations and * * * [receive] supporting statements from employees. We feel that preserving the confidentiality of employee statements is conducive to this end." See, also, *Montgomery Ward & Co. v. National Labor Relations Board*, 377 F. 2d 452, 455-456 (C.A. 6). An employer violates Section 8(a)(1) where he goes further and actually takes reprisals against employees for giving statements to the Board—as happened in this case.

Again, Section 11 of the Act confirms this interpretation of Section 8(a)(1). Under Section 11 of the Act, the Board could have compelled the employees here to give statements had they not done so willingly (see p. 15, *supra*). Employer discrimination resulting from employee participation in Board proceedings pursuant to subpoena is prohibited by Section 8(a)(1), since here, too, the protections afforded "are co-extensive with its [the Board's] subpoena powers." *Oil City Brass Works v. National Labor Relations*

Board, supra, 357 F. 2d at 471. And, as explained in *Electro Motive*, there is no basis for denying similar protections because the employee voluntarily participates (389 F. 2d at 62):

In terms of the effective administration of the Act * * * we see no distinction between the protection of managerial employees who cooperate willingly with the Board and of those who render assistance under legal compulsion. The effect of the discharge, in either event, is to tend to dry up legitimate sources of information to Board agents, to impair the functioning of the machinery provided for the vindication of the employees' rights and, probably, to restrain employees in the exercise of their protected rights.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted.

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Solicitor General.

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Assistant to the Solicitor General.

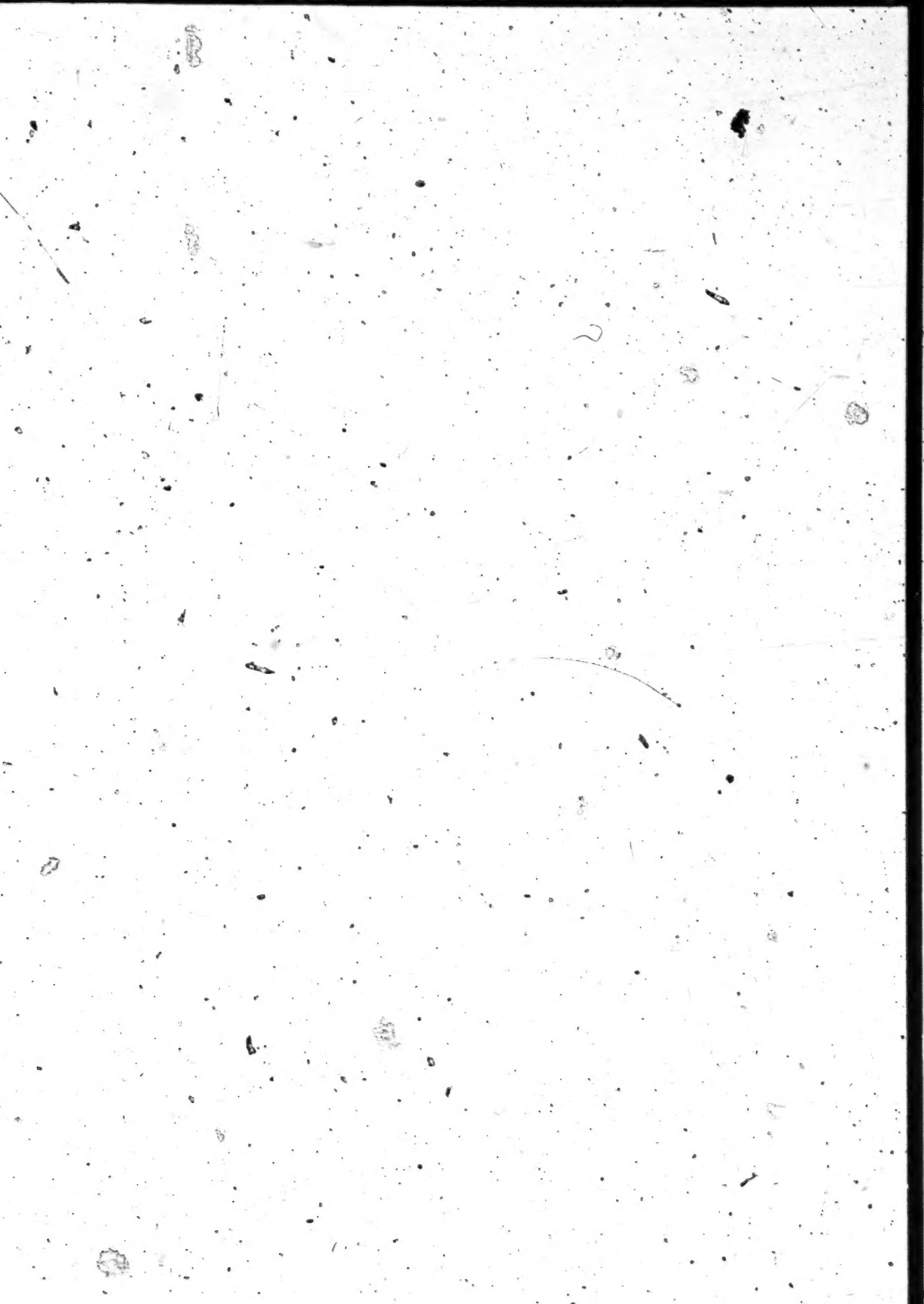
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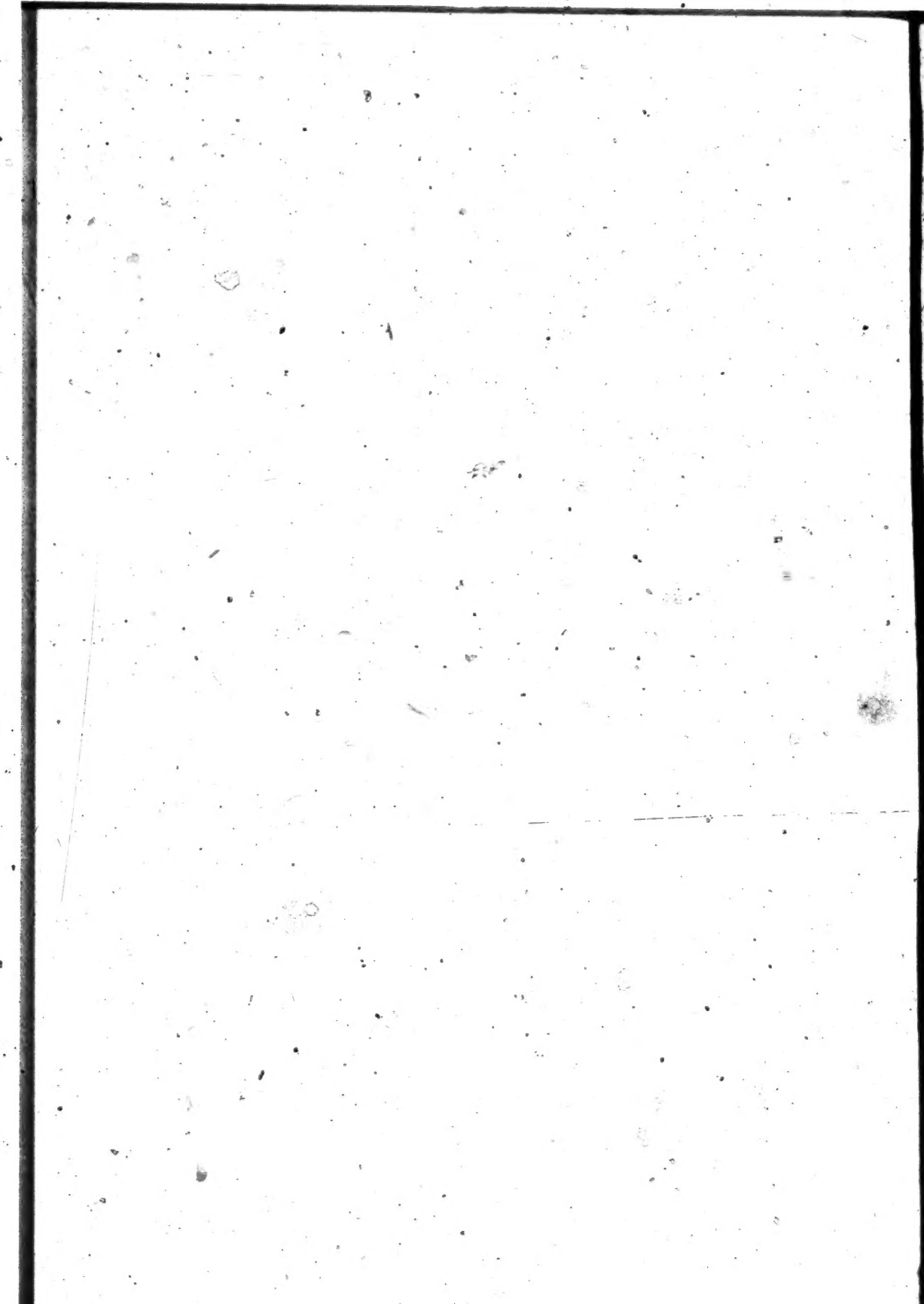
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NOVEMBER 1971.





SUPREME COURT, U. S.

Supreme Court, U.S.

FILED

DEC 22 1971

ROBERT SEAYER, CLERK

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1971

No. 70-267

**NATIONAL LABOR RELATIONS BOARD,
*Petitioner,***

v.

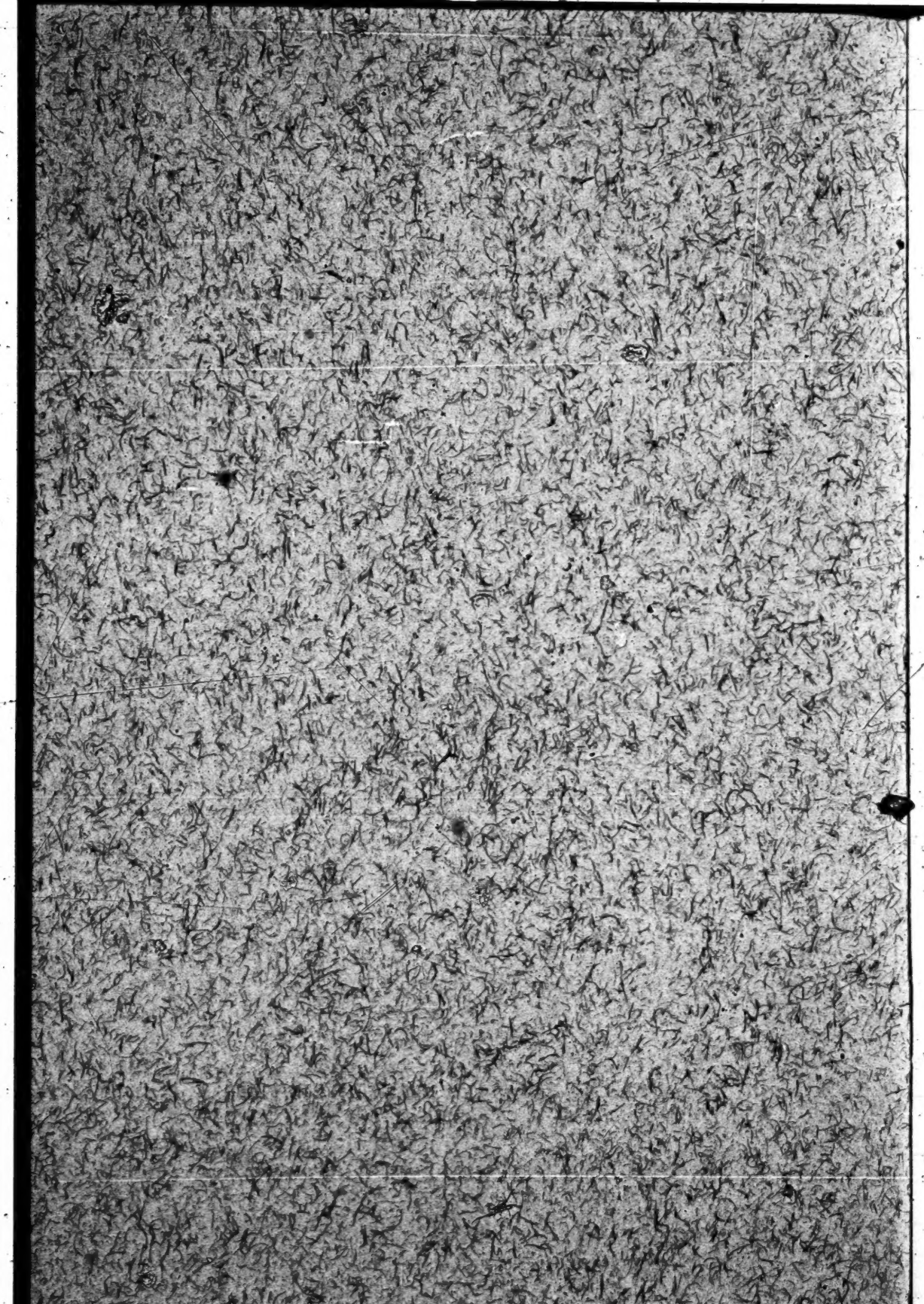
**ROBERT SCRIVENER, D/B/A AA ELECTRIC COMPANY,
*Respondent.***

**On Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit**

**BRIEF FOR ASSOCIATED BUILDERS AND
CONTRACTORS, INC., AS AMICUS CURIAE**

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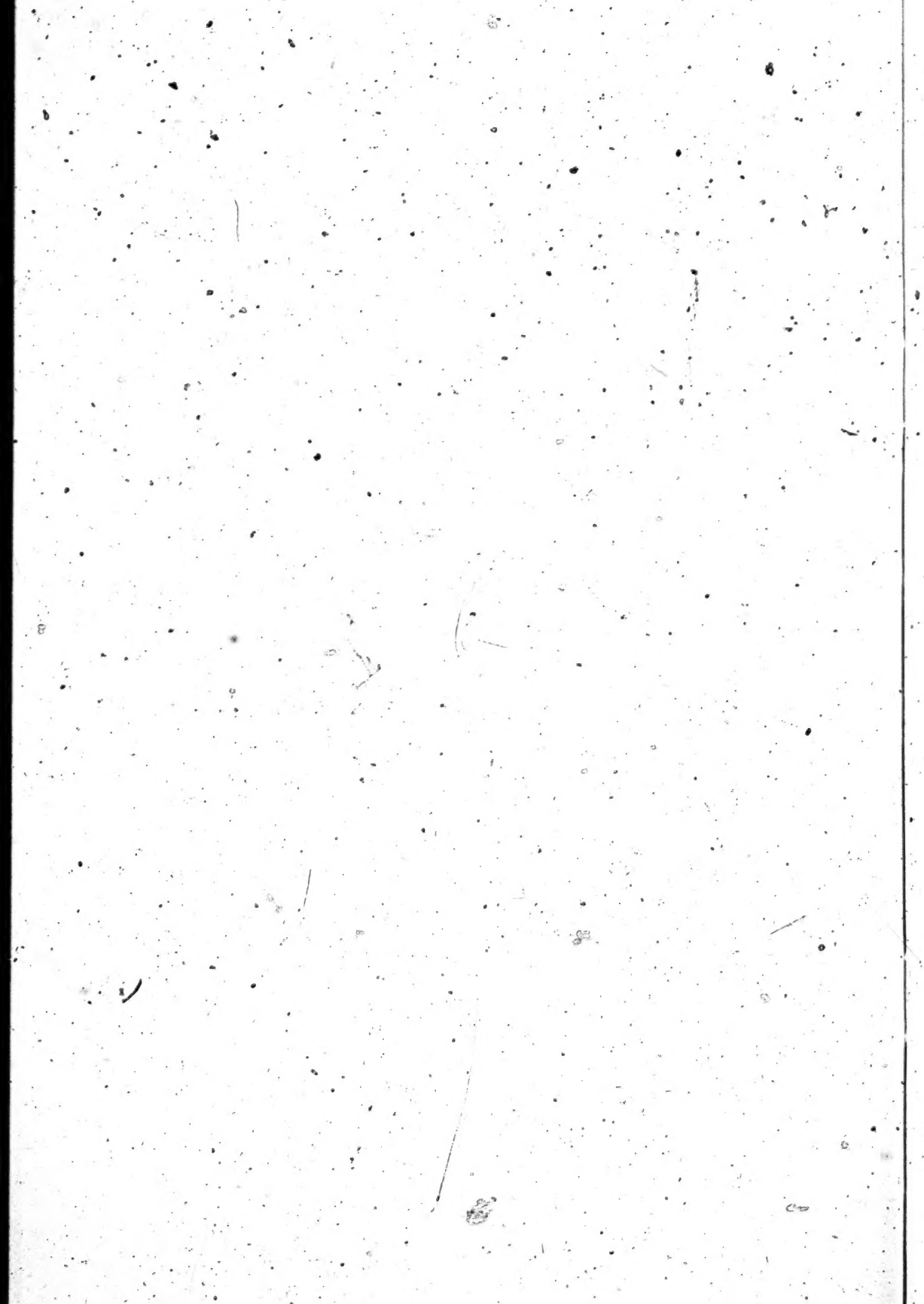
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROBERT SCRIVENER, D/B/A AA ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit

BRIEF FOR ASSOCIATED BUILDERS AND
CONTRACTORS, INC., AS AMICUS CURIAE

I. INTRODUCTION

This amicus curiae brief is submitted by Associated Builders and Contractors, Inc. as provided in Rule 42 (2) of the Rules of the Supreme Court of the United States, the petitioner and respondent having given their consent for Associated Builders and Contractors, Inc. to file such a brief.

II. INTEREST OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.

Associated Builders and Contractors, Inc., herein at times called ABC, is a Maryland non-profit association with headquarters at Glen Burnie, Maryland. It has chapters in 15 states and represents approximately 3800 members. Its membership consists of contractors, sub-contractors and other business enterprises, such as suppliers, dealers and financial institutions who are involved in construction.

ABC has long taken a great interest in labor legislation and in cases that arise under the National Labor Relations Act as amended. Most of its members fall in the category of small business, and there is always special concern among ABC members when they view a small-business contractor in the construction field having serious problems under the Act. In the instant case it appeared to ABC that the resources of the respondent, a man engaged in small business in the construction industry, would of necessity be quite limited. Hence ABC desired to share responsibility in this matter by filing this *amicus curiae* brief.

III. QUESTIONS PRESENTED

1. Should the decision of the Eighth Circuit Court of Appeals denying enforcement be affirmed because, apart from other considerations, the findings and order of the National Labor Relations Board with respect to a violation of Section 8(a)(4) are not supported by substantial evidence?
2. Would enforcement of the Board's order as to Section 8(a)(4) promote the purposes of the Act?
3. Does the history of Section 8(a)(4) indicate whether it has application to statements given a Board agent prior to the issuance of charge and complaint?

IV. STATUTES INVOLVED

1. Section 7 and Section 8(a) (1) and (4) of the National Labor Relations Act, as amended, are accurately set forth on page 2 of the brief of the National Labor Relations Board and will not be repeated here. In addition a portion of Section 10(f) of the Act is involved. Such portion states that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

2. Section 10(e) of the Administrative Procedure Act. (60 Stat. 237, 243, as amended; 5 U.S.C. 706) The relevant portion of this Section provides that the reviewing court shall:

"hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . (4) unsupported by substantial evidence. . . ."

3. The National Industrial Recovery Act, Ch. 90, 48 Stat. 195 (1933).

4. The Wagner Act, 49 Stat. 449 (1935).

V. STATEMENT

The facts as set forth in the Board's brief omit certain important events and developments and cast everything in a light highly unfavorable to the respondent. The respondent's brief sets forth an accurate and realistic statement of facts as supported by the record. Amicus adopts such statement of the respondent and also sets forth the following parallel and additional facts which amicus urges should be considered by the Court.

Respondent is an electrical contractor in residential and commercial construction in Springfield, Missouri (A 218, 220-221; 10, 11, 132). On or about March 15, 1968, Local 453, International Brotherhood of Electrical Workers, AFL-CIO, began picketing an apartment building on which the respondent was working (A 161), and continued to picket it for about two weeks (A 138). On March 18, 1968, five of the respondent's employees signed authorization cards in designation of the union (A 255-256, 6-8, 19, 50, 59, 78, 85). At least one of the employees understood that the purpose of the signature was to obtain an election (A 112). The local business manager, Jack Moore, asked Scrivener the evening of that same day to come to his office. Scrivener did so the next morning (A 133). Moore placed the signed cards before Scrivener on a desk (A 143). Scrivener testified that he had some doubts about the genuineness of the signatures, although he did not say so to Moore (A 144-145). He inquired of Moore what Moore wanted him to do and the reply was to "file a collective bargaining agreement with us." (A 9) Moore's assistant, Ray Edwards, gave Scrivener a copy of a contract between the Springfield Division of National Electrical Contractors Association, Inc. and Local Union No. 453 (A 134, 195). Scrivener apparently was not a member of the Association and Moore wanted him to sign a letter of assent to the Association Contract (A 165, 166). Scrivener testified that Moore told him he wanted an answer about the contract about 6 o'clock that evening (A 134). Moore and Edwards denied that Moore made such a demand (A 12, 160).

On Wednesday, March 20, Scrivener gave card signers Bill Cockrum, Wesley Smith and Albert Wilson their pay checks. Scrivener told the employees, "I never did work for a non-union shop. You are jeopardizing yourself." (A 135) Scrivener had himself been a member of Local 453 about 18 to 20 years (A 145). On cross-examination Scrivener testified, "I did not want them getting them-

selves in trouble for me, which I know in my mind is a violation, to work for a non-union shop." (A 148)¹

The testimony is uncontradicted that Scrivener told these three men before they left to come back the next morning. With respect to this conversation the uncontradicted testimony of Wilson on cross-examination follows:

"Q. Regardless of what was said there at the time you received your check that evening, at least you admit that Mr. Scrivener told you to come back the next morning.

A. That's right, but he told me and Wesley and then he hollered out to Bill as Bill was getting into his truck.

Q. And there wasn't even a lapse of how much time then?

A. Oh, maybe—well, it was three or four minutes. We had to pick our tools up." (A 71)

On about March 20 Scrivener hired Clyde Hunt, a journeyman, and Jim Statton, a helper (A 150). Statton was a new employee, but Hunt had worked for Scrivener before (A 136; 146). He was working for Scrivener when Wesley Smith began work for him, having worked for him about seven months prior to the events of March, 1968 (A 146; 136). Also working for Scrivener at the time was Boyd Perryman, a helper (A 138).

The union filed charges with the Board on Thursday, March 21, alleging that the respondent had violated Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Act (A 169).

On Friday, March 22, Scrivener wrote letters to Bill Cockrum, Smith and Wilson. He stated a desire to clarify

¹ Article XXVII, Sec. 1 (21) of the 1970 IBEW Constitution states that members may be penalized on account of "working for any individual or company declared in difficulty with a L.U. (local union) or the IBEW in accordance with this Constitution."

the situation—that he had not discharged them and they were “free and welcome to work for me as usual at any time.” (A 232) He invited them to return to work the next Monday morning. Scrivener stated in the letter that he had merely wanted to report to the men what Jack Moore told him when he demanded a signed contract—that Scrivener would be required to hire all men through the hiring hall (A 232). Moore denied that he ever made such a statement, although Scrivener reiterated the contention when he testified that Moore told him after the cards were signed that “it looks like you’ve got five new employees. If you want me to I’ll send them to you at noon.” (A 145)

When recalled to the witness stand and as the last witness at the hearing, Moore also testified: “What has always been the practice is, if we have guys sign authorization cards, *till we have a contract with that employer*, we leave him there to work.” (A 165) (Emphasis supplied).

The three employees returned to work on Tuesday, March 26, as they did not receive the letters in time to go to work on the Monday preceding. Bill Cockrum who had worked for Scrivener only since about February, 1968, was laid off a day later and did not return to work. He was selected for lay-off through a drawing of straws (A 137, 138; 48).

A remaining two of the five card signers, Don Cockrum and Claude Sanders were not laid off and continued their employment without interruption until April 18th. Albert Wilson and George Smith also worked continuously until April 18th except for a day of illness by Wilson and a short lay-off by Smith of the days between March 27 and April 1 (A 64; A 74; A 26; A 27).

The evening of April 17 a Board representative met with Bill and Don Cockrum, Smith, Sanders and Wilson (A 64). He took affidavits about the case from three or

four of them (A 53; 64). Wilson testified that when he went to work the next morning Scrivener motioned him into his office and inquired if "you guys" met with the Labor Board man the night before; also, that when he and Don Cockrum were getting their materials together Scrivener again inquired about their meeting (A 65). Sanders likewise testified that Scrivener queried him as to whether "the boys" had found out anything the night before (A 81). Scrivener on the other hand testified he did not know the five men had talked to the Labor Board investigator until "on April 20th when Wesley Smith told him." (A 141). Meanwhile on April 18th he laid off Don Cockrum, Smith, Wilson and Sanders (A 27; 65-66; 80-81; 96). Scrivener testified the reason the men were laid off was "just lack of work." (A 141)

Wilson testifying about the layoff stated: "He said if there was anything to do, he'd see what came up over the weekend and he'll call and to give him a phone number. So I gave him the phone number so he called me." (A 65) Wilson went back to work on May 4th, pursuant to Scrivener's call and worked until May 10th, when either he quit or was laid off (A 74-75; 139).

Smith went back to work on May 4th and was still working for the respondent at the time of the hearing on June 25th (A 29). He testified that he had been laid off occasionally even prior to March 15th (A 34). He testified on direct that when he was laid off in April, Scrivener had some residential jobs going but he couldn't say exactly how many or how many he had worked on (A 28). He testified also that there was work on an eleven-unit apartment building, the rough-in part being almost completed (A 28). Asked on cross-examination if it wasn't "a fact that work was slow at those times when you were laid off, that the work was pretty well caught up," Smith replied, "Well, I don't know, I just don't know what comes in the shop." (A 46) Sanders

was asked on cross-examination, "At any time that Mr. Scrivener laid you off, isn't it true that business was slack or the work was slack?" (A, 83) Sanders replied, "Well, I couldn't say as to that because we finish up on one job and there's always something else. But then maybe—I don't know." (A 84) Sanders went to work for another employer three or four days after the April 18th layoff and was still working there at the time of the hearing. The new job is less exacting of physical labor than the one with Scrivener. Donald Cockrum's statement given to the NLRB investigator indicated there were at least three houses being roughed in on April 18, although in his testimony he said there might have been more or less than three (A 98). Cockrum went back to work for Scrivener on April 30th and was working for him at the time of the hearing (A 100). He had not been a steady employee of Scrivener, but had worked for him four or five times over a period of approximately three years (A 85). Perryman, Statton and Hunt had continued to work for Scrivener from the time of their employment in March (A 140, 141).

The union filed an amended charge on May 13, 1968, alleging the respondent terminated the employment of Don Cockrum, Albert Wilson and George Smith on or about April 18, 1968, inter alia, because they gave testimony in the case. A complaint in turn was issued on or about May 17, 1968, which alleged inter alia, that the respondent laid off Donald Cockrum, Albert Wilson, George Smith and Claude Sanders, because they met with and gave evidence to an agent of the Board. The complaint also alleged that since on or about April 18, 1968, the respondent has failed and refused to reemploy Albert Wilson, George Smith, and Claude Sanders to their former or substantially equivalent positions.

VI. SUMMARY OF ARGUMENT

Apart from the refusal of the Circuit Court of Appeals for the Eighth Circuit by reason of its conclusion that the language of Section 8(a) (4) does not apply to the facts of this case, it is submitted that in any event substantial evidence is lacking to support the allegations of the complaint directed to that section and any derivative 8(a) (1) allegations. In addition, it can hardly be said that it is promoting the purposes of the Act as described in its preamble for a powerful federal agency to build up and pursue these controverted charges of 8(a) (4) violation against so small an employer. The history of Section 8(a) (4) indicates it was in fact enacted for the limited purpose of protecting those who file charges or give testimony. To expand the language to protect others would be a form of judicial legislation.

VII. ARGUMENT

A. The Lack of Substantial Evidence

The Trial Examiner found Scrivener's explanation of why he made the layoffs on April 18th to be unconvincing, Scrivener's explanation that he was short of work not being credited. The Board agreed. The Trial Examiner affirmatively found and the Board brief states there were jobs to be done and that employees Perryman, Hunt and Statton were kept at work.

As the trial examiner stated in his decision, "Scrivener is entitled to run his business in any manner he desires as long as it does not discriminate unlawfully against his men."

What was Scrivener's practice? One basic practice he made clear in his testimony as quoted in the facts above, was that when his employees had jobs going he "wanted them to finish their own jobs, which has always been anyone's practice." There is not one iota of evidence in

the record to refute Scrivener's contention that this was his business practice. Had this testimony not been correct, Board counsel could easily have refuted it by counter testimony from the employees. The Trial Examiner, moreover, contradicts his own reasoning about Scrivener's right to manage his business because he undertakes in his decision to require Scrivener to transfer his men from job to job, journeymen being able, he maintained, to pick up a job at any point and follow it through. There is force in the Trial Examiner's contention, but if Scrivener had handled his business another way there is no rule of law that requires him to change his method.

Indeed, whether there were jobs for the four employees to do when they were laid off is far from established by the evidence. The Trial Examiner's decision, adopted by the Board, is vague on the subject. It found that "the men were on jobs at the time and there was some other work such as the apartment house still to be done." The Board brief goes farther than the Trial Examiner-Board decision. It states that "the Company had substantial work to complete in at least three houses and one 11-unit apartment building." The figure of "at least three houses" was gleaned apparently from Don Cockrum's statement. This statement is uncorroborated and the Trial Examiner spent a considerable portion of his decision trying to determine whether Cockrum's testimony should be credited. Whether as a matter of fact there was work for any of the employees at the 11-unit apartment building is by no means established by the evidence. The most definite reference to the nature of the work there on April 18th was that it was being roughed in. Did this fact make possible or preclude work on it by the four laid-off employees? The evidence does not show. Nor does it show what effect the picketing had on the apartment house project even though apparently it had been lifted by April 18th. Attempts by respondent's

counsel to develop more facts about the picketing were held improper.²

Moreover, not one of the four laid-off employees testified that he was on a job yet to be completed when he was laid off on April 18th. Had they been working on such jobs it was incumbent on Board counsel to elicit such facts from them.

In determining that the separations on April 18th were discriminatory the Trial Examiner admitted the evidence was circumstantial (A 236). He stated that he considered the prior discharges in arriving at his decision (A 235). He did not patently consider certain contradicting evidence that is highly important. The facts are that two of the five card signers, Don Cockrum and Sanders, worked without interruption through the events of March and until April 18th. The three others were definitely told when they were given their pay checks on March 20 to come back to work the next morning and this statement to them was reiterated in a letter which asked them to return to work the following Monday, March 25th. They actually did return to work on Tuesday, March 26th.

The findings of the Trial Examiner lay stress on Scrivener's discussions with the employees about the union during the March events as showing a purpose to discriminate. It was Scrivener's constitutional right to express his opinions about the situation as long as they were not coercive.³ The tenor of his discussions with his employees about the union was that he as a former union member had not worked for a non-union shop and the men were jeopardizing themselves. There is evidence in the record that it was indeed a violation for a member

² See cross examination of Roy Edward (A 162-163).

³ *NLRB v. Virginia Electric Power Co.*, 314 U.S. 469 (1941); *NLRB v. American Tube Bending Co.*, 134 F.2d 993 CA-2 (1943), Cert. Den. 320 U.S. 768 (1943).

of Local 453 to work for a non-union employer.⁴ It is likewise tenable that Scrivener could have feared that once he assented to the contract with Local 453 it would send him other employees. Indeed Article VIII of the contract which Moore presented to Scrivener provided that the "union shall be the sole and exclusive source of referrals of applicants for employment."

Under all the circumstances, was it reasonable and a requirement of the National Labor Relations Act that Scrivener say nothing to express his concern? In this connection it is important to consider the 1947 amendment of Section 8(c) of the Act which reads as follows:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Scrivener's comments were somewhat like those of an employer who told his employees they might not qualify to hold their jobs under a union area contract because of the required ratio of journeymen to apprentices. These remarks were held to be protected as free speech. *Snap Out Binding & Folding, Inc.*, 166 NLRB 316, 325, 326 (1967).

Similarly a statement to an employee that if a union got in there might be more money per man but less work because employees would be sent home after their work for the day was completed, instead of being assigned to other departments, was held lawful. *Cardinal Extrusion Co.*, 136 NLRB 615, 620 (1962).

Also protected as free speech was an employer statement that the union was interested only in initiation fees and dues, and customarily pays off the company whose

⁴ Testimony of Billy A. Cockrum (A 56).

employees it represents so that company will hire and fire unusual numbers of employees so that union may obtain more initiation fees. *Redwing Carriers, Inc.*, 165 NLRB 60, 66, 67 (1967).

Thus Scrivener's remarks to his employees about the union were like the cases quoted above, mere predictions or opinions about their economic future if they went along with the union. They were in no sense threats, and under the circumstances should not be considered violations of the Act.

The standard of review laid down for the Court in cases such as instant case was explained in *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951). The Court in the latter case reversed and remanded an order of the Board in which the Board had overruled its Trial Examiner and found an employee to have been discharged for giving testimony in a prior case. Reviewing the history of the Administrative Procedure Act and the Taft-Hartley Act, the decision of the Court stated in part:

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act directs that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals. The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's

decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informal judgment on matters within its special competence or both."

Commenting on the rule as laid down by *Universal Camera Corp. v. NLRB*, the Court in *NLRB v. Isis Plumbing & Heating Co.*, 322 F2d 913 CA 9 (1963), stated:

"Under the rationale expressed in *Universal Camera*, supra, it is our duty in determining the substantiality of evidence supporting a Labor Board decision; to take into account contradictory evidence or evidence from which conflicting inferences could be drawn.

"The substantiality of evidence must take into account whatever in the record fairly detracts from its weight . . ."

In addition to the contradictory evidence discussed above in support of the respondent the following facts are also worthy of consideration:

1. Scrivener laid the men off at the close of the day on April 18th. Had he wanted to retaliate for what they did the night before he would more likely have laid them off at the beginning of the day.

2. He volunteered to see what would come in over the week-end and in fact put three of the four back to work shortly, Cockrum on April 30th, Wilson and Smith on May 4th. Smith and Cockrum continued to work there. Sanders obtained other less strenuous employment and did not return. Wilson's work was discontinued about May 10th, but there is no allegation or evidence of discrimination against him with respect to that separation from employment.

3. The three were reinstated before the amended charge was filed. Hence, the reinstatements were voluntary and not caused by NLRB action.

Under all the circumstances it is submitted that the substantial evidence required by Section 10(f) of the

National Labor Relations Act, as amended, and by Section 10(e) of the Administrative Procedure Act was lacking. In similar circumstances both the Courts and the Board have found in favor of the employer.⁵ The allegations directed to Section 8(a)(4) and any derivative 8(a)(1) allegations should be ordered dismissed.

B. The Purposes of the Act

It is submitted that what the Board is undertaking in this case contributes nothing toward promoting the purposes of the Act, Section 1 under the present Act as under the Wagner Act concludes with the following language:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or for other mutual aid or protection."

It is a conservative statement to observe that no *substantial* obstruction to the free flow of commerce was involved in this case. The Board concedes the respondent does not come up to its jurisdictional standards for the construction industry. Hence, how does the great zeal to push the case happen to arise? Why does the Board

⁵ *NLRB v. Isis Plumbing & Heating Co.*, 322 F2d 913 CA-9, 1963; *Standard Electric Co. v. NLRB*, 387 F2d 717 CA-5 1968; *NLRB v. Sunbeam Lighting Company, Inc.*, 318 F2d 661, CA-7, 1963; *General Adjustment Bureau v. NLRB*, 331 F2d 913 CA-7, 1963; *NLRB v. The Newton Co.*, 236 F2d 438 CA-5, 1956; *Harris Hub Co.*, 142 NLRB 287 1963; *Henrich Lumber, Inc.*, 100 NLRB 1270, 1952; *Fashion Fair, Inc.*, 163 NLRB p. 97, 1967; *Lowell Sun Publishing Co.*, 136 NLRB 206 1962; *Tru-Scale Products, Inc.*, 147 NLRB 1122, 1964; *Western Lace & Line Co. d/b/a; Western Fishing Lines Co.*, 103, NLRB 1408, 1953.

spend itself taking statements from the employees? It was on notice that there was a lack of jurisdiction, yet its agent spends his time interrogating and obtaining these statements. In turn the Board tries to build a case on the assumption that employees were entitled to protection with respect to these statements that should not have been taken in the first place. The facts as reviewed earlier in this brief are by no means convincing that the layoffs on April 18th were discriminatory.

Under all the circumstances it is submitted that the purposes of the Act are not served by the insistence of the Board that it pursue this case.

C. The Meaning of Section 8(a)(4) as Revealed by Its History

The language in Section 8(a)(4) is very narrow and restrictive. To commit this unfair labor practice an employer must come under the language:

"to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

The recently published book, *The Developing Labor Law* stated, regarding Section 8(a)(4) that "the narrow scope of the unfair labor practice is to be noted. The reason for the discrimination must be that an employee has filed charges or given testimony under the Act. Planning to file charges or testify does not come within the language of Section 8(a)(4)."⁶

This narrow language was in the Wagner Act of 1935 and was then known as Section 8(4). In the Taft-

⁶ Published by the Bureau of National Affairs, Inc. at the instance of Section of Labor Relations Law, American Bar Assn. (1971), page 134. Also see *Ogle Protection Service, Inc.*, 149 NLRB 545, 566 (1964), cited by the respondent wherein the trial examiner's decision, adopted by the Board, stated: "Since the discrimination does not come within the *precise language* of Section 8(a)(4), therefore, I make no finding of a violation thereof." (emphasis supplied)

Hartley amendments of 1947 and the Landrum-Griffin amendments of 1959 the language was carried forward without change, and it remains the same today as when originally enacted.

In reporting out the bill which became the Wagner Act, the Senate Education and Labor Committee stated regarding this section of the law:

"The fourth unfair labor practice, which prohibits the discharge or discrimination against an employee for filing charges or giving testimony under the bill is self-explanatory."⁷

Senator Wagner in comments at committee hearings and in debate on the Senate floor regarding the section had made an identical observation.⁸

The concept for the language came from activities that arose pursuant to the National Industrial Recovery Act. One of the Senate Education and Labor Committee Reports issued during the 74th Congress in fact referred to the executive order issued pursuant to the N.I.R.A. as having the following language:

"No employer subject to a code of fair competition approved under said title shall dismiss or demote any employee for making complaint or giving evidence with respect to an alleged violation of the provision of any code of fair competition approved under said title."

The report mentioned the language before the Congress in the Wagner Act, as a reiteration of that in the Executive Order.⁹

⁷ Report No. 573, Senate Education and Labor Committee, 74th Congress, 1st session, page 12.

⁸ Hearings on H.R. 6288 of House Com. on Labor, 1st Session, 74th Congress, March 13, 1935, p. 14; Senate debate, May 15, p. 935, 79th Cong. Record 7571.

⁹ See page 29 of document mentioned in footnote 10 infra.

In a Senate Committee Report commenting on Section 8(4) as set forth in the draft bill before the Senate Education and Labor Committee, there was the following observation:

"The need for this provision is attested by various decisions of the National Labor Relations Board (matter of New York Rapid Transit Corporation, decided Nov. 21, 1934; matter of Zenith Radio Corporation, decided Nov. 26, 1934; matter of Ralph A. Freundlich, Inc., decided Feb. 13, 1935)." ¹⁰

The Board argument about the purport of these cases as set forth on page 13 of its brief can be misleading. The New York Rapid Transit case is cited as support for the proposition that giving affidavits was a protected activity under the language of the National Industrial Recovery Act. The clear implication, therefore, is that giving an affidavit under the present Section 8(a)(4) of the National Labor Relations Act is protected. However, a careful reading of Public Resolution No. 44 of the 73rd Congress and the related Executive Order of June 29, 1934, creating the National Labor Relations Board of the pre-Wagner Act era shows no reference to the use of the charge as it is known under the Wagner Act. Hence, the filing of the affidavits in the New York Rapid Transit case may be viewed as similar to the filing of a charge under present law. As for the protection afforded an employee in the Freundlich case who had testified in a state court, many of the matters incident to the National Industrial Recovery Act were tried in state courts and the language of the Act as quoted above was clearly and rightly broad enough to protect such activity.

Hence the examples from N.I.R.A. days as cited in the Board's brief in the final analysis protected employees as to activities that were the equivalent of filing charges

¹⁰ Comparison of S. 2926 and S. 1958 of 73rd and 74th Congresses, respectively, in Report of Senate Education and Labor Committee of 74th Congress, 1st Session.

or giving testimony under the National Labor Relations Act, as amended.

When Congress enacted the Wagner Act in 1935 it tailored the language to fit precise situations that would arise under the Act. Using exact and restrictive wording in the then Section 8(4) it protected employees against discrimination for filing charges or giving testimony. Sections 10(b) and 10(c) of the Act in turn clarify what is meant by the filing of charges and giving testimony under the Act.¹¹

Had Congress wished to broaden the rule it incorporated in the law, it is reasonable to assume it would have used broader and less restrictive language rather than narrow it to the precise acts of filing charges and giving testimony. To broaden this language as the Board would have us do is something to be presented to the Congress, not to the Courts.

The early cases, moreover, indicate that those who administered the law at the outset dealt with cases that regarded this language literally. The early reported cases had to do with discrimination that arose from the specific language used in the law, to wit, the filing of charges.¹²

One purpose of Section 8(a)(4) should be to give the utmost protection to employees who are "put on the spot" and have to testify. In this connection, *Pedersen v. National Labor Relations Board*, 234 F2d 417 (1956) cited by the Board in its brief makes the point that the protection of the employee should be as broad as the Board's subpoena power. Once an employee is given a Board subpoena he should have all-out protection of Section 8(a)(4). The 8(a)(4) allegation in this case, however, embraces no employees under any sort of compulsion.

¹¹ 49 Stat. 449 (1935).

¹² See *Albert J. Barston & TWOC*, 23 NLRB 666, May 8, 1940; *F. W. Poe Manufacturing Co. & TWU*, 27 NLRB 1257, Nov. 8, 1940; *The Kramer Company & ILGWU*, 29 NLRB 921, Feb. 20, 1941.

They voluntarily gave a Board agent statements that should not have been elicited in the first place. The language of the Section does not apply and the situation shows no urgent need for its application.

VIII. CONCLUSION

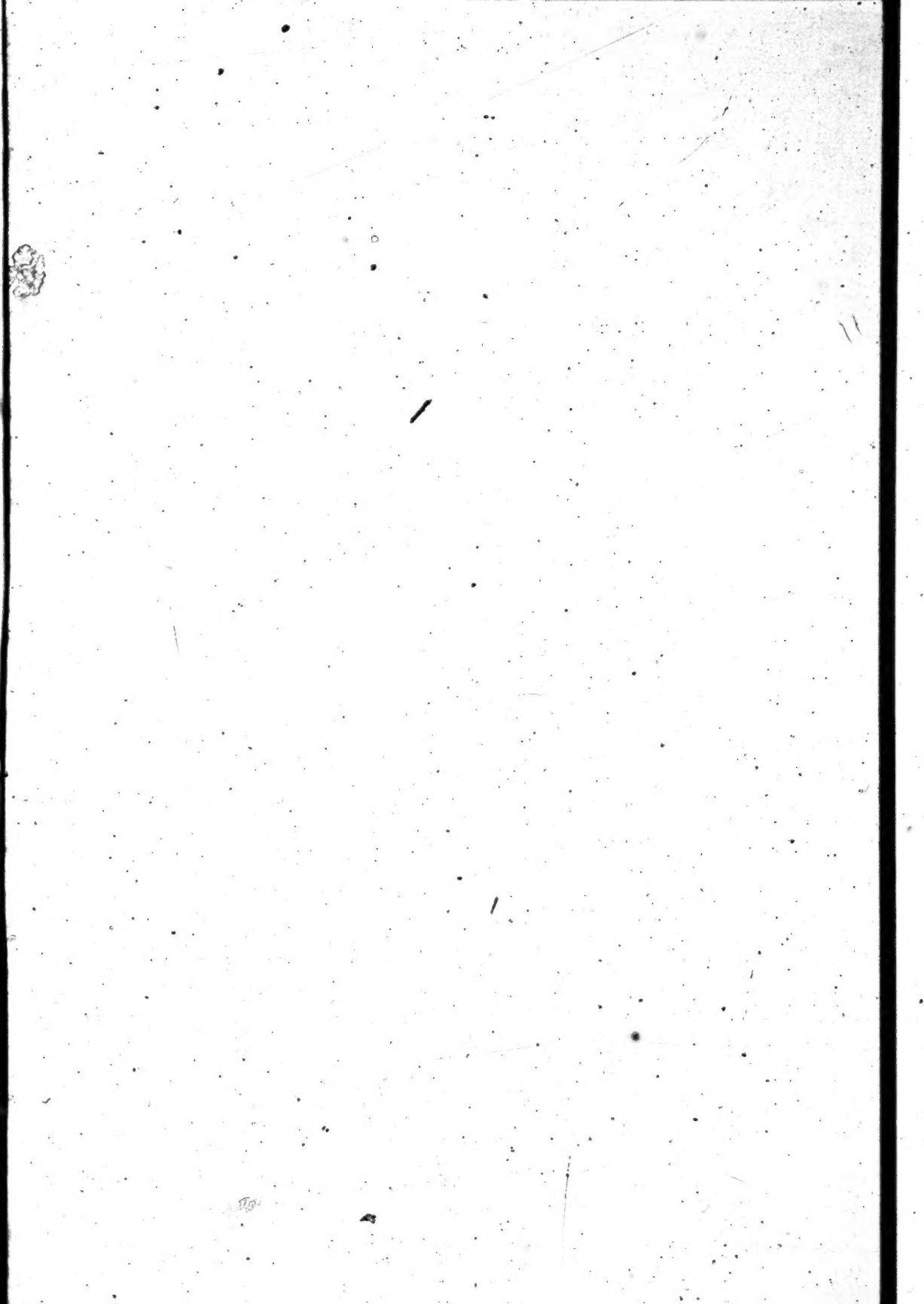
Amicus respectfully submits that the refusal of the Court of Appeals of the Eighth Circuit to enforce the Board's order in this case should stand. Apart from other considerations there is a lack of substantial evidence to support the Board's findings and order. Pursuit of the case will not promote the purposes of the Act. The decision of the Eighth Circuit in *National Labor Relations Board v. Ritchie Manufacturing Co.*, 354 F2d 90 (1966) is a sound precedent in line with legislative history as following the precise and clear wording of Section 8(a)(4), especially as applied to the facts of the instant case. To follow the reasoning of the Board would result in judicial legislation, contrary to the constitutional guarantee of separation of powers.

Respectfully submitted,

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December 22, 1971



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-297

LIBRARY
SUPREME COURT, U. S.

NATIONAL LABOR RELATIONS BOARD,
Petitioner.

vs.

**ROBERT SCRIVENER, D/B/A AA ELECTRIC
COMPANY,**
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1971

No. 70-267

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

**ROBERT SCRIVENER, D/B/A AA ELECTRIC
COMPANY,**
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Did the Court properly conclude that secret, pre-complaint statements given to the Labor Board are not equivalent to "testimony under this Act" protected under Section 8(a)(4)?

2. Should the Court's Decision denying enforcement of the Board's Decision herein be affirmed for the additional reasons contended by the Company: that the record fails to show Board jurisdiction under Section 2(6) and (7) or under Section 10(b) of the Act; that

the Board's assertion of jurisdiction against this Company (which is in a class excluded by the Board's jurisdictional standards) is arbitrary, capricious, discriminatory and a denial of due process of law; or that the findings of violations on which jurisdiction has been asserted are not supported by substantial evidence on the record as a whole?

STATEMENT OF THE CASE

A. Proceedings Before Board.

The Union¹ filed charges against the Company² with the Board's³ Regional Director on March 21, 1968, accusing the Company of violating Sections 8(a)(1), (3), and (5) of the Act.⁴ These unfair labor practice charges accused the Company of interference with rights of employees to join the union, refusing to bargain with the union, and discharging three employees because of their union interests or activities. (A. 169) The Company's attorney promptly denied the charges, and pointed out that the Company does not meet the Board's published jurisdictional standards. (Resp.Exh. 1, A. 3-4, 190) The Trial Examiner (A. 219), the Board (A. 273), and Petitioner's Brief herein (Pet.Brief, pp. 4-5, note 4) all now

1. Local 453, International Brotherhood of Electrical Workers, AFL-CIO.

2. Robert Scrivener, d/b/a AA Electric Company.

3. National Labor Relations Board.

4. National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.). Sections 7 and 8(a)(1) and (4) are quoted at page 2 of Petitioner's Brief herein. Sections 8(a)(3) and (5), respectively, provide that it shall be an unfair labor practice for an employer: "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *" [with certain exceptions not here material relating to union security agreements and their enforcement]; and "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

agree that the Company does not meet the Board's jurisdictional standards.

Although no complaint had yet been issued by the Board's Regional Director on the above charges in Case No. 17-CA-3519 (A. 169), and thus no hearing had been conducted, the Union filed an amended charge on May 13, 1968, realleging the accusations of the original charge but adding a new charge under Section 8(a)(4) and stating the following as the basis therefor (A. 173):

"On or about April 18, 1968, the Employer terminated the employment of George Smith, Claude Sauntlers, Albert Wilson and Don Cockrum, *because they gave testimony in the matter of Board Case No. 17-CA-3519, * * **" (Emphasis added)

Company counsel again wrote a letter dated May 15, 1968, to the Regional Director reiterating the lack of Board jurisdiction under its published standards, and stating the following concerning the new charge under Section 8(a)(4) (Resp.Exh. 3, A. 3-4, 193):

"* * * the charges should be dismissed as being completely ridiculous. The charge regarding the alleged termination of April 18, 1968, could not be true as it is alleged that the employees were terminated for giving testimony in Board Case No. 17-CA-3519, and there has never been any proceeding in such matter that I know about, and if any hearings were held without notifying me, I am sure that they would be illegal. I believe that an attorney representing a party should be advised of any hearings before they are held."

Company counsel further requested the Regional Director to advise what ruling had been made concerning the allegation of lack of Board jurisdiction "as this case has

been pending for quite some time, and I think that we should be advised of your determination in this regard." (A. 193-194)

Without responding to the Company's letter, the Regional Director issued a Complaint against the Company dated May 17, 1968 (A. 180), accusing the Company of all of the violations raised in both of the above-mentioned charges. (A. 175-180) Paragraphs 5(c) and (e), and 9 of the Complaint (A. 177, 179) alleged a violation by the Company of Section 8(a)(4) of the Act with respect to the four employees who the union's charge of May 13 had claimed the Company terminated "because they gave testimony" in this same case, before any Board hearing had been held. (A. 173)

After the Trial Examiner's Decision, which held the Company did not meet the Board's published jurisdictional standards (A. 219), but held against the Company on all other issues (A. 216-249), and the Company's exceptions to these adverse findings (A. 249-272), the Board Decision of June 30, 1969 (A. 272-276) with one member not participating, and one member dissenting (A. 277), held that since the Company does not meet the Board's published jurisdictional standards (A. 273) it would not effectuate the policies of the Act for the Board to assert jurisdiction on all of the violations alleged. According to its long-established policy of limiting its jurisdiction "to enterprises whose operations had a pronounced impact upon the flow of interstate commerce", and its "jurisdictional standards [which] establish the guidelines by which the Board normally assesses such impact", and to insure "uniform administration of national labor relations policy" by concentrating its resources on "resolving labor disputes having substantial impact on commerce", the Board declined to assert jurisdiction on the "alleged independent

and unrelated violations of Section 8(a)(1), (3) and (5).” (A. 274) The Board Decision, therefore, dismissed all allegations excepting the claimed violation of Section 8(a)(4), explaining its reasons as follows (A. 275):

“The reason is that, unlike remedying the violations of Section 8(a)(4), the remedying of the alleged violations of Section 8(a)(1), (3), and (5) has no immediate impact on the vindication of the right of an individual to resort to the Board’s processes and thus provides no independent basis for asserting jurisdiction. In these circumstances, *we find that equal and effective administration of the policies of the Act require us to limit our exercise of jurisdiction to remedying the Section 8(a)(4) violations.*” (Emphasis added)⁵

B. Proceedings Before Eighth Circuit Court of Appeals.

General Counsel petitioned the United States Court of Appeals for the Eighth Circuit for enforcement, and the Company sought review.

Despite the above quoted language from the Board’s Decision indicating that the Board decided to “limit our exercise of jurisdiction to remedying the Section 8(a)(4) violations”, the General Counsel contended in its brief to the Eighth Circuit that the Board had found violations not only of Section 8(a)(4), but also of Section 8(a)(1). Assuming the Board’s Decision was as contended by the General Counsel the Eighth Circuit held that Section 8(a)(4) could not be construed to encompass the discharge of employees “for giving written sworn statements to Board field examiners” since such pre-complaint investigatory statements do not constitute “testimony” as

5. Petitioner’s Brief (pp. 6-7) overlooks the fact that the Board did not assert jurisdiction over violations of 8(a)(1) herein. (A. 275)

meant in that Section. The Eighth Circuit had previously so held in *NLRB v. Ritchie Mfg. Co.*, 354 F.2d 90, and this decision had been followed by the Sixth Circuit in *Hoover Design Corp. v. NLRB*, 402 F.2d 987. The Eighth Circuit also rejected General Counsel's contention that Section 8(a)(1) could provide an independent basis for enforcement of the Board's order in this case, the Court noting that this is "a case where the Board's jurisdiction to act is marginal." (A. 281-282)

In view of its denial of the General Counsel's petition for enforcement on the grounds stated above, the Eighth Circuit did not reach all of the points raised by the Company.⁶

C. The Evidence.

Since the Board declined to assert jurisdiction of any violations other than Section 8(a)(4) and consequently did not review the exceptions of the Company (A. 249-272) to the Trial Examiner's Decision on the allegations under Sections 8(a)(1), (3), and (5), we shall limit our Statement to the evidence which may be deemed relevant to the 8(a)(4) claims.⁷

(1) Company's Business and Relationship to Commerce.

The Company is an individual proprietorship engaged in residential construction, run by Robert Scrivener, its

6. The points contained in the Company's Brief to the Eighth Circuit are summarized under Point II of our Argument, *infra*.

7. All but the first sentences of paragraphs one and three, and all of paragraph two, page 3, of Petitioner's Brief are deemed irrelevant to Section 8(a)(4) violations, as the evidence there referred to was offered and received on the 8(a)(3) and (5) theories. Since the Board and Court have never reviewed the record as a whole to see if these findings of the Trial Examiner are supported by substantial evidence, it is erroneous to assume these facts are established, as Petitioner's Brief does.

owner.⁸ (A. 16, 28, 218) Scrivener himself has been a member of the Union herein or a sister IBEW local in Tulsa from 1936 until he commenced the Company in Springfield, Missouri, about three years prior to the hearing. (A. 220, 132, 133)

The Company grossed almost \$69,000 during calendar 1967, and in that year purchased some \$23,000 of goods and materials from the local office of Graybar Electric Company. (A. 119, 218) Graybar's local manager, Mr. Griffin, who was called by General Counsel, was permitted to testify (over the Company's objections to hearsay) as to what his Kansas City office had told him over the telephone their records in Kansas City showed, stating that the Company had purchased some \$18,000 of materials and equipment from Graybar during the first quarter of calendar 1968. (A. 121) He also testified that his local records, which were not produced in evidence but which he and Counsel for General Counsel had investigated *ex parte* at his office before the hearing showed the Company had purchased \$4,769.33 from his Company in 1968. (A. 122-123) Of these latter figures, which he had on an adding machine tape brought with him to the courtroom, he testified that the Company had made the following purchases of materials which he thought originated outside Missouri: six 40-watt fluorescent lamps, and two pair of pliers manufactured in Cleveland and Chicago respectively (A. 123); conduit from Pittsburgh, Pa.; couplings from Chicago; "Greenfield conduit, *this is assumptive, I think would have been Chicago*" (A. 123-124); "a quantity of Starlight fixtures manufactured in Kentucky" (A. 124); and "two items of Starlight from Kentucky and one from Lasonia in Tennessee on the fix-

8. Scrivener is not "President", as erroneously stated by Petitioner's Brief, pp. 3, 4.

tures" (A. 124). After stating that he had not had an opportunity to inspect all his records and invoices for 1968, Griffin "estimated" (A. 218, 219, 273) that about 90 percent of the Company's purchases in 1967 and 1968 "would have been manufactured outside the State of Missouri." (A. 124) The Trial Examiner elicited from the witness that about 5 percent of the stock Graybar keeps on hand is manufactured in Missouri, and 95 percent outside Missouri. (A. 124-125) Griffin admitted that the records concerning this are kept in Kansas City (A. 120-121) and it is physically impossible to tell from looking at the goods whether they come from within Missouri or from outside. (A. 125)

The Company's exceptions (A. 253, 255, 256, 269, 270-271) attacked the Trial Examiner's reliance upon these estimated double-hearsay, *ex parte*-investigation, projections for finding that the Company's business affected commerce within the meaning of Sections 2(6) and (7) of the Act. But the Board relied entirely on this testimony of Griffin to find statutory jurisdiction. (A. 273, note 1)

The Trial Examiner (A. 219), and presumably the Board, although it did not expressly rule on the point (A. 272-273), rejected the Company's argument (A. 256) that at most the relationship of the Company's business to interstate commerce was *de minimis*. The Court of Appeals, however, may have agreed with the Company's *de minimis* argument, in stating that "the Board's jurisdiction is marginal." (A. 282)

(2) Employment and Layoff Histories of Four Alleged Discriminatees.

The Company had been in business about three years prior to the hearing, engaged primarily in residential electrical construction. (A. 123) Due to the sporadic nature of the Company's work, each of the four alleged

discriminatees admitted that there had been occasional layoffs by the Company prior to March, 1968, which is when the union activities are claimed to have commenced and which is before any Board investigation of the charges filed on March 21, 1968. (A. 169)

Wesley Smith, who had worked for the Company about 19 months, admitted occasional layoffs (A. 16, 34) because of lack of work. (A. 34) These were usually at the end of the work day. (A. 31)

Albert Wilson, who had worked for the Company about one year, admits that there were occasions when he and other employees worked less than a full week, after they finished certain jobs. (A. 58, 68)

Claude Sanders, who had worked about a year (A. 77-78), testified that such layoffs had occurred "every once in awhile * * * when business was slack and they laid us off, some of us." (A. 83)

Don Cockrum testified he had worked for the Company "off and on" over a period of about three years. There had been at least five breaks in his employment during that period, part of them due to his having quit. (A. 85)⁹

(3) The Layoffs of April 18, 1968.

Respondent, Robert Scrivener, testified that the reason he laid off four employees on April 18, 1968, was lack of work, and that at that time he was not even aware they

⁹ The Company filed exceptions to the Trial Examiner's failure to recognize and credit these admissions by General Counsel's own witnesses (A. 263), which corroborate Scrivener's testimony that the reason for his layoffs on April 18 was lack of work (A. 141), and that layoffs for this reason occurred in this Company during its entire three years of operations.

had talked to a Labor Board investigator. (A. 141)¹⁰ He testified that he did not lay off these employees, or fail to recall them, because they had talked to an NLRB investigator. (A. 141) Scrivener testified that his work was exceedingly slack at this particular time. (A. 139) One reason for this was the picketing by the Union of his apartment house project.¹¹ In order to get the other crafts to work on the job, the project owner had required Scrivener to pull his men off the job. (A. 138, 153) This caused a 60 percent reduction in the Company's available work. (A. 138) He had laid off William Cockrum and George

10. Scrivener testified he first learned of the fact that employees had talked to the Labor Board agent from Wesley Smith, after the April 18 layoff. (A. 141) Since Smith was not recalled until May 4, the Trial Examiner inferred that this was before the April 18 layoff (A. 233-234) although it is just as possible that it was May 4 or afterwards, and Smith himself denied any interrogation by Scrivener about the Labor Board investigation. (A. 46-47)

11. The picketing of this project was by the same union which later filed the charges herein. Ray Edwards, one of the charging party's business agents, testified that he placed the picket on this job on March 15, 1968. (A. 161) This was before the union claims to have represented any of the Company's employees. (A. 162) Since Respondent Company is too small to meet the Board's jurisdictional standards, Respondent could not get Board assistance to remove this picketing and to prevent any violations of Section 8(b)(4)(B) by the Union, which is a known offender of that law. *NLRB v. Local 453, International Brotherhood of Electrical Workers, AFL-CIO*, 432 F.2d 965 (8th Cir. 1970), enforcing 170 NLRB No. 60 (1968). That the picketing caused an interruption of the Company's work is shown not only by Scrivener's testimony (A. 138), but by the Company's offers of proof that Lee Goings, the project owner, had complained to Business Agent Edwards of the Union about it. (A. 162-164) Although the Trial Examiner rejected the offer of proof as being a "collateral matter" not directly related to the issues of the case (A. 164), his later findings were that the Company should have made the work on the apartment house available for his employees rather than subcontracting it out to Aton Luce Company, a union contractor. (A. 239) This later finding of the Trial Examiner, in the face of his earlier refusal to permit the Company to produce evidence and cross-examine Ray Edwards concerning the Union's having caused the interruption of the Company's work by this picketing rendering it impossible for the Company to complete the job, was excepted to by the Company. (A. 254-255, 258, 260-261, 266)

Smith on May 27, 1968, for lack of work. (A. 137) William Cockrum was never recalled, due to unavailability of work (A. 139), and his layoff is no longer an issue in this case. (A. 275) Smith had been recalled on April 1 to come back and finish some houses he had started (A. 139), but which had required some work to be completed by other crafts before he could conclude. (A. 139, 155)

No testimony was adduced to show that Respondent Scrivener had any knowledge of what, if anything, the four employees may have told the Board investigator on April 17, 1968.¹²

The testimony relied on by the Trial Examiner for finding that Scrivener had knowledge of the fact that some employees had talked to the Board investigator on the night of April 17, 1968, is that of Albert Wilson and Claude Sanders.¹³

Wilson testified that the NLRB investigator took his statement along with two others on the night of April 17. (A. 64) When he went to work the next morning Wilson

12. Respondent Company filed exceptions to the Trial Examiner's failure to note this fact. (A. 263)

13. Neither of the first two employee witnesses of General Counsel (William Cockrum and Wesley Smith) gave any testimony to support the 8(a)(4) theory. (A. 55, 46-47) The Complaint allegation 4(d) on interrogation referred only to "employees" (A. 177), and Respondent's motion to make it more definite and certain prior to the hearing had been denied. (A. 185, 186) Respondent's motion to sequester the witnesses to avoid the witnesses hearing one another's testimony was overruled. (A. 4-5) After the witnesses heard the attacks by Respondent's counsel on the insufficiency of this phase of the case (A. 30-31, 41-42), the third and fourth employee witnesses who had sat through the proceedings and heard it all gave the testimony on which the Trial Examiner now relies. Although the Trial Examiner found this alleged interrogation a violation of Section 8(a)(1) (A. 234), the Board held it would not assert jurisdiction on this interrogation issue; and therefore, its relevance here is only on the point of whether it constitutes, along with countervailing evidence including Respondent's denial of knowledge, substantial evidence to show Respondent had sufficient knowledge of facts to establish an 8(a)(4) violation.

claims that Scrivener said, "Hey, Bud * * * Did you guys meet with the Labor Board last night?" and "They sure don't talk much, do they?" (A. 65). Wilson claims nothing else was said at that time, other than his own "yes" to the first question. Wilson claims that later in the day Scrivener said to him [Wilson] in the presence of Don Cockrum,¹⁴ "You said you met with the Labor man last night?", to which Wilson replied, "Till about 11 or 11:30." Respondent is supposed to have said again, "That old boy sure don't tell you nothing", to which Wilson is supposed to have replied, "No, Bob, he's a German." (A. 65)* Wilson did not consider this conversation coercive, and he admits that at no time since March 25, 1968, when he received a letter from Respondent (Respondent's Exh. No. 2, A. 3-4, 192) had Respondent indicated any kind of action would be taken against him or anyone else for union activities or for talking to a Board agent, and at no time had Respondent ever asked him or any other employee to tell any particular thing to any Labor Board agent. (A. 75) And when Wilson testified about why he and the others were laid off on April 18, in response to the General Counsel's question as to how this came about, Wilson stated, "No work is what we were told", and did not testify it was for any unlawful reason. (A. 65) Wilson testified he was recalled on May 4, and worked thereafter until May 10, when he went to work for Midwest Electric Company (A. 74-75).¹⁵

14. Don Cockrum did not corroborate Wilson's testimony. (A. 118) Nor does the statement taken from Don Cockrum on May 1, 1968. (A. 188)

15. Although Wilson volunteered that he was laid off by Respondent on May 10 (A. 74-75), there is no such allegation in the Complaint. (A. 175-180) The Trial Examiner rejected Respondent's contention that the May 10 separation of Wilson could not be contended since it was not raised in the Complaint (A. 238) and the testimony of Scrivener that Wilson just failed to show up after May 10, and was therefore considered as having voluntarily quit his employment. (A. 139) Scrivener positively testified that Wilson was not laid off on May 10, or thereafter. (A. 139)

Sanders' testimony is that Scrivener came up to him and a group of employees and said "Did you boys find out anything last night", to which Sanders replied, "Not that I know of, Bob", and Sanders says "that was all we said." (A. 80) No other employee from the group supposedly present appeared to corroborate Sanders' testimony in this regard.¹⁶ Sanders admitted that Scrivener told him this layoff was made because the work was slack (A. 80), and Sanders could not deny this was true. (A. 84) Although Sanders was never recalled (A. 81), he admits he is a man 59 years of age, and he has a job presently with another electrical contractor which does not require as much physical labor. (A. 81) Upon being foreclosed from further cross-examination of Sanders on the point, Respondent offered to prove that if Sanders were permitted to answer, he would admit that he had told Scrivener since his layoff that the job he presently had was better for him and he would not take any reemployment offer for that reason. (A. 82-83) Sanders admits that Scrivener has never stated that he was going to take any action against him for talking to a Labor Board man or anything like that. (A. 83) Sanders admits he went to work for Roper Electric Company three or four days after April 18, and he has worked there "continuously since." (A. 84)

The only other employees who testified stated that Scrivener had never interrogated them concerning any statements they may have given the Labor Board investigator, including William Cockrum (A. 55); Don Cockrum (A. 118), and Wesley Smith. (A. 46-47) The Trial Examiner did not permit Smith to answer questions as to whether he knew of Scrivener having talked to any other employees about any statements they may have given the Labor Board investigator (A. 47), or as to whether he

16. The other three employees who testified denied any statements by Scrivener in their presence concerning employees having talked to a Labor Board agent. (A. 46-47, 55, 118)

claimed that Respondent "ever took any action with reference to [Smith] for talking to any Labor Board man or anything like that?" (A. 30-31)

Smith was recalled May 4 and worked ever since. (A. 29, 30) Don Cockrum was recalled April 30. (A. 100)¹⁷ Although the Trial Examiner was not satisfied that Wilson and Sanders had been adequately reinstated, though he found they were recalled on May 4, 1970, he expressed no similar dissatisfaction concerning Don Cockrum. (A. 239)

(4) Board Agent's Initiation of Charge and Complaint.

The record shows that NLRB Agent Frerking took a statement from Don Cockrum, at least, on May 1, 1968 (A. 188), designed to support a charge of a violation under the Board's theory of 8(a)(4) in connection with the April 18 layoffs. The record also shows that no charge under 8(a)(4) was pending at that time, since the 8(a)(4) charge was first filed on May 13, 1968 (A. 173), only four days prior to issuance of the Complaint. (A. 180) Since the Board agent investigated the 8(a)(4) issues before the filing of any charge on those issues, the Company contends that the NLRB agent unlawfully initiated the filing of the 8(a)(4) charge and the Complaint based thereon in violation of Section 10(b) of the Act. (A. 271)

17. Petitioner's Brief erroneously states it was June before Don Cockrum was recalled. (Pet.Br., p. 5, note 3) Don Cockrum admits he was recalled April 30. (A. 100) There may have been a break in his employment thereafter, since he testifies he went back to work for Respondent again three weeks prior to the hearing of June 25 (A. 100), but the complaint does not allege any wrongful act of Respondent between April 30 and June, and there is no evidence that he was laid off or discharged between April 30 and June. (A. 175-180) It must be concluded, therefore, that any separation of his employment after April 30 was not claimed to result from wrongful action of Respondent.

SUMMARY OF ARGUMENT

The Eighth Circuit Court's Decision should be affirmed because it properly construed the Act.

The word "testimony" has long been understood by lawyers, Courts, and legislatures to refer to oral evidence given by witnesses in a formal trial or hearing where all parties are present and have an opportunity to cross-examine. In enacting Section 8(a)(4) of the Act, protecting an employee from discrimination "because he has * * * given *testimony* under this Act", Congress obviously had this long understood meaning of "testimony" in mind. If Congress had sought to protect "statements" or "affidavits" or "those giving information to a Board investigator" under the Act, then Congress would have used such words, and not the legal term, "testimony."

That Congress purposely chose the word "testimony" in Section 8(a)(4), and intended it to mean oral evidence given in a formal hearing subject to cross-examination, is also shown by viewing the entire Act and the repeated use of the word "testimony" in that sense. It is on the "preponderance of the *testimony*" that the Trial Examiners and Board are required to decide unfair labor practice cases, under Section 10(c). Before such hearings are held, a charge, complaint, and notice of hearing must be filed and served on the accused party, under Section 10(b). The accused party "shall have the right to file an answer * * *, to appear in person * * * and give *testimony* at the place and time fixed in the complaint." The hearing is required to be conducted under the rules of procedure and evidence applicable in Federal District Courts. "Witnesses shall be examined orally under oath * * *." Board Rule 102.30.

The dangers of employer retaliation against employees for giving statements to Board agents is more imagined

than real, since such statements are declared by present law to be held in strict secrecy and are privileged from disclosure, until the witness has testified. By the time the employer has an opportunity to obtain it for cross-examination under the "Jencks rule", the protection of 8(a)(4) to those giving "testimony under this Act" has already attached. Until then, the secrecy provides sufficient protection. But in any event Congress has enacted criminal penalties under 29 U.S.C. § 162 subjecting to a \$5000 fine and a year in jail, or both, anyone who shall "wilfully resist, prevent, impede, or interfere with any member of the Board of any of its agents or agencies in the performance of their duties" under the Act. Congress has thus forcefully protected the Board from the imagined dangers. Congress could have included such language under Section 8(a)(4) of the Act, but did not choose to do so, perhaps because Congress did not want the Board to be its own discriminatee, prosecutor, and judge. But whatever reason Congress had, its language in Section 8(a)(4) is clear and explicit; and if Petitioner desires further legislation, its requests should be addressed to Congress.

There is no substantial evidence on the record as a whole that Respondent was motivated by "anti-labor Board" discrimination when laying off its employees on April 18.

The Eighth Circuit Court's Decision should be affirmed additionally on the other grounds raised by the Company in the Eighth Circuit.

ARGUMENT

I. The Eighth Circuit Court's Decision Should Be Affirmed Because "Testimony under This Act" in Section 8(a)(4) Plainly Does Not Include Pre-Complaint Statements Which Are Taken Without Notice to the Employer and Without His Knowledge and Which Are Confidential until the Person Giving the Statement Has Testified in a Formal Hearing.

The Eighth Circuit Court¹⁸ properly construed Section 8(a)(4) of the Act. Congress did not include pre-complaint statements within the meaning of that statute's protection for "testimony under this Act."¹⁹

The word "testimony", as used by lawyers and legislators, means oral evidence given by a witness in a formal trial or hearing where all parties are present and have an opportunity to cross-examine and present "testimony" of their own.²⁰ A "statement" or "affidavit" cannot be equated to "testimony" since the written statement or affidavit is not admissible in a trial or hearing without some authenticating testimony of a witness who appears and

18. 435 F.2d 1296.

19. *Hoover Design Corp. v. NLRB*, 402 F.2d 987 (6th Cir. 1968); *NLRB v. Ritchie Mfg. Co.*, 354 F.2d 90 (8th Cir. 1966); *NLRB v. American White Cross Laboratories, Inc.*, 160 F.2d 75, 76 (2nd Cir. 1947); *Ogle Protective Service*, 149 NLRB 545, 556 (1964).

20. *Ensign v. Pennsylvania*, 227 U.S. 592, 599 (1913); *Optner v. United States*, 13 F.2d 11, 13 (6th Cir. 1926); *State v. Schifsky*, 243 Minn. 533, 69 N.W.2d 89, 93 (1955), holding that wife's out-of-court declaration was not "testimony" within meaning of statute precluding one spouse from giving testimony against the other without his consent; *Moore v. Commonwealth*, 288 Ky. 242, 156 S.W.2d 115, 117 (1941), holding "testimony" to mean "words uttered by witnesses in court;" *Sledge v. Singley*, 139 Ala. 346, 37 So. 98, 99 (1903); *Whisler v. Whisler*, 147 Iowa 712, 89 N.W. 1110, 1111 (1902); *In re Seigle's Estate*, 117 Misc. 642, 31 N.Y.S.2d 623, 626 (1941).

submits himself to cross-examination.²¹ "Testimony" does not include the written sworn schedules filed in bankruptcy court by the bankrupt. *Ensign v. Pennsylvania*, 227 U.S. 592, 599 (1913). When Congress enacted Section 8(a)(4) protecting employees from discrimination because of their "testimony under this Act," Congress was obviously aware of the meaning of "testimony" in the Courts. Being aware of that meaning, Congress would have used some other word if it had not intended "testimony" as long understood and defined by the Courts. To impute to Congress any other intended meaning of this word "would do violence to common intelligence."²²

In looking at the Act in its entirety, and the Rules, Regulations and Statements of Procedure published by the Board thereunder, it can be seen that neither Congress nor the Board has intended "testimony" to apply to written statements given to Board agents in pre-complaint investigation. See excerpts from the Act and the Board's Rules, Regulations and Statements of Procedure attached as Appendix A. hereto.

The Board's powers to prevent unfair labor practices are set out in Section 10 of the Act. Section 10(b) provides that: the Board has power to issue a complaint and notice of hearing only whenever it is charged that a person has committed an unfair labor practice and only in respect to those charges; the person complained of "shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony

21. *Emery v. Orleans Levee Board*, 11 So.2d 652, 655 (La. App. 1943); *Shepard v. Board of Supervisors of San Joaquin County*, 137 Cal.App. 421, 30 P.2d 578, 581 (1934). The main reason that an affidavit or written statement is not admissible in evidence under the hearsay rule, is that otherwise the right of the parties to cross-examine the out-of-court declarant would be frustrated. McCormick, *Law of Evidence* (West Publishing Co. 1954), p. 458.

22. *Edelstein v. United States*, 149 Fed. 636, 640 (8th Cir. 1906).

at the place and time fixed in the complaint;" the Board has discretion to permit other persons to intervene "in the said proceeding and to *present testimony*," and "such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States * * *." Consistent with the rules of evidence and procedure applicable in federal district courts, the Board's Rules require that witnesses "*shall be examined orally under oath*, except that for good cause shown after the issuance of a complaint, *testimony* may be taken by deposition." Board Rule 102.30.²³ The Board has also recognized that at the unfair labor practice hearing, all parties must be accorded the right to call, examine and cross-examine witnesses under the rules of evidence and procedure applicable in federal district courts. Board Statement of Procedure 101.10.

It is on the basis of the "testimony" presented at the Board hearing that the Trial Examiner, and the Board, render their decisions in unfair labor practice cases under the Act. Section 10(c) provides that: the "testimony taken" at the unfair labor practice hearing "shall be reduced to writing and filed with the Board;" the Board may thereafter in its discretion, *but only upon notice*, "take further testimony," and the Board must render its decision "upon the preponderance of the *testimony* taken" in the Board hearings. It may not, of course, decide a case on the basis of pre-complaint statements which are excluded from admissibility under the hearsay rule.

Other provisions of the Act where formal hearings upon due notice are provided for, wherein "testimony" under

23. If depositions are taken, "the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting" and all parties have a right to object to questions asked and have their objections reflected in the transcript. Board Rule 102.30(c).

the Act may be presented, could be cited²⁴ and discussed. But the above provisions of Section 10 plainly show that Congress required "testimony" to be presented in formal Board hearings where all parties had a right to appear and participate upon due notice. This "testimony" must be presented under the rules of evidence and procedure applicable in federal district courts, and the Board's Rule 102.30 recognizes that such "testimony" must be presented through witnesses who "shall be examined orally under oath" with the right of other parties guaranteed under the Act's Section 10(b), to be present, to make objections, cross-examine, and present other "testimony". It is obvious from reading the Act as a whole, that Congress referred to this oral examination of witnesses under oath, at formal hearings where all parties are entitled to be present and participate under procedures recognized for federal district court trials, when it protected "testimony under this Act" in Section 8(a)(4). It is equally obvious that Congress did not intend to encompass within the meaning of "testimony under this Act" the ex parte, pre-complaint statements taken by Board agents investigating a charge before any complaint and notice of hearing has been filed.

The scheme of the Act itself shows that in two specific ways Congress deemed an employee's open identification as a participant in Board proceedings required protection: (1) where the employee filed a "charge," and (2) where the employee gave "testimony" under the Act. In both instances the employee's identity as a participant against the employer could not be concealed. If the employee files a charge, that charge must be signed by the employee, and

24. See Section 9(c)(1) providing for representation hearings "upon due notice"; Section 10(d) which requires the Board to file for injunctive relief in the federal district courts on certain unfair labor practice charges, and in such court proceedings guarantees the right of any person involved in the charge "to appear by counsel and present any relevant testimony."

a copy of that charge served on the employer. Section 10(b) of Act; Board Rule 102.9-102.14; Board Statement of Procedure 101.2. If the employee gives "testimony" in a formal Board hearing, the employer has a right to attend such hearing, cross-examine the employee, and otherwise participate in that proceeding. Section 10(b) of the Act; Board Rules 102.15-102.19; Board Statement of Procedure 101.10. In either case, the employee filing the charge or giving testimony in a Board hearing is openly and directly confronting his employer in an adversary proceeding, and obviously Congress enacted Section 8(a) (4) to protect the employee from discrimination by the employer resulting from such confrontation.

The question here is whether the employees named in the Union's charge of May 13, 1968 (A. 173), had given "testimony under this Act," at the time of the alleged discrimination on April 18, 1968. The charge initiating this proceeding does not claim that the employees here involved had filed any charges under the Act, and thus there is no claim here on that theory.²⁵ The charge was that the

25. The Board has no jurisdiction to file a complaint against the company, under Section 10(b) of the Act, except "*whenever it is charged*" the company committed a violation. When a charge is filed, then the Board has the power to issue and cause to be served on the company "a complaint stating the charges in that respect." *NLRB v. Shipbuilding Local 22*, 391 U.S. 418, 424 (1968); *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Since the charge (A. 173) does not allege discrimination by reason of any "charges" having been filed by the employees in question, the Board would have had no jurisdiction to have so contended in the complaint herein, and the complaint should not be so construed. [A. 177, paragraphs 5(c) and (e)] The theory of the Trial Examiner for his finding of an 8(a) (4) violation because charges were filed for these employees (A. 236-238) is completely outside the Board's jurisdiction under the complaint and charges herein. (A. 173, 177) Those findings are also completely without any supporting evidence whatever that anyone filed the charges "as agents for the employees," and the Trial Examiner's theory in this respect is gross speculation and conjecture unsupported by substantial evidence upon the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). In any event, the question on which certiorari was granted herein does not encompass the Trial Examiner's theory referred to.

employees were discriminated against "because they gave testimony in the matter of Board Case No. 17-CA-3519". (A. 173) The record is undisputed that no formal hearing had ever been held at the time of the alleged discrimination, so the Petition requests this court to *construe* 8(a)(4) and the charge herein as meaning "written sworn statements given a Board investigator in pre-complaint investigation." Such construction would, for the above reasons, constitute a complete judicial amendment of the statute in question to make it say something entirely different from what Congress obviously intended. Such a construction would make the word "testimony" mean something different than its recognized meaning in the Courts under the federal rules of civil procedure and the rules of evidence there employed, which Congress plainly required to be applied to Board proceedings under Section 10(b) of the Act.

The Board seeks judicial legislation to extend the Section 8(a)(4) protection beyond the two types of situations expressly mentioned therein, where the employee openly confronts his employer as discussed above. The Board claims that the 8(a)(4) protection must be extended to a third group of employees, those who have NOT filed charges or given testimony in a formal Board hearing, but who have given "written statements to Board agents." (Pet.Brief, p. 10).²⁶ The Board contends that protection

26. Contrary to Petitioner's contention, that all four employees here involved gave "written, sworn statements" to the Board (Pet.Brief, p. 4), three of those employees testified only that they gave "statements" or were "interviewed." (Smith, A. 26-27; Wilson, A. 64; and Sanders, A. 79-80) Only Don Cockrum testified that he gave a written, sworn statement (A. 88-89), and only his statement was introduced and received in evidence. (General Counsel's Exhibit No. 4, A. 92, 187) All four employees' testimony does indicate, however, that the statements allegedly given by them were confidential and outside the presence of the Company representatives, and without any notice to the employer that they were being made. In fact the statements, if made, were completely unnecessary under the Board's Statements of Procedure, 101.4, which gives the Regional Director discretion to

under Section 8(a)(4) should be found for employees "irrespective of the nature of the information they give to the Board or the manner in which they do so," (Pet.Brief, p. 11) and "*irrespective of whether the employee filed a charge or actually gave testimony at a formal hearing.*" (Pet.Brief, p. 12) Congress did *not* so provide, as is in effect admitted by said contentions.

Petitioner's contention that employees might be reluctant to give statements to Board investigators if 8(a)(4) is not construed to express a protection from employer retaliation as a result of such cooperation overlooks three points. First, Congress did not so provide. Second, such investigative statements are held in strict confidence, and are taken under strict secrecy.²⁷ The only circumstance in which the employer may learn of the contents of such statements would be to cross-examine the employee (the Jencks rule) after the employee has already testified in the formal Board hearing.²⁸ At that point the Eighth Circuit's interpretation of 8(a)(4) affords protection to the employee since he has given "testimony under this Act" in the formal Board hearing. Until that stage, no additional protection is needed since the secrecy of the statement should be enough. Board Rule 102.117(b) provides that statements will be "held confidential and are not matters of official record or available to public inspection * * *." Third, in Section 12 of the Act, Congress has

conduct only such investigation as necessary under the circumstances. Prior to the taking of these alleged statements, the Company had already shown the Board that it was not subject to the Board's jurisdictional standards (A. 3-4, 190), a fact now admitted. (A. 274-275) (Pet.Brief, p. 6, note 4)

27. *Intertype Co. v. NLRB*, 401 F.2d 41, 45 (4th Cir. 1968), cert.den., 393 U.S. 1049 (1969); *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 34 (5th Cir. 1969); Board Rule 102.117(b). See also 5 U.S.C. § 552 (b)(7), which exempts federal agency investigative files from disclosure requirements of Administrative Procedure Act.

28. 18 U.S.C. § 3500; Board Rules 102.117, 102.118.

granted forceful protection against the type of interference which Petitioner imagines, since Congress has provided:

"Any person who shall wilfully resist, prevent, impede, or interfere with any member of the Board of any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both."²⁹

Congress did not choose to make the protection under Section 8(a)(4) as broad as this criminal statute. Perhaps Congress felt it would be inappropriate to let the Board be the prosecutor, judge, and jury in a case where it also claimed to be the discriminatee.

Petitioner erects imaginary circumstances, not shown by this record, and then claims that these imaginary circumstances make it urgent that the Eighth Circuit's decision be reversed. However, a review of this record under the substantial evidence rule as the Company is entitled to have under *Universal Camera Corp v. NLRB*, 340 U.S. 474 (1951) will show that Petitioner's imagined circumstances do not exist in this case. All that can be shown here is the fact that the employees met with the Board agent. That this is not a sufficient basis for showing a violation of 8(a)(4), even under current Board law, is shown by *Aerovox Corp. of Myrtle Beach, S.C.*, 172 NLRB No. 97, 68 LRRM 1444, 1447 (1968) holding that the mere fact an employee has "testified" and was discharged thereafter does not support a finding of violation under 8(a)(4). And the Board has held that to prove an 8(a)(4) violation, over the employer's claim that the layoff was for economic reasons as here, the Board must present proof that the employer was motivated by the fact that the employee's testimony in the Board hearing was adverse to the em-

29. 29 U.S.C. § 162.

ployer. See *Liberty Sportswear Co.*, 183 NLRB No. 127, 74 LRRM 1459, 1461, 1462 (1970).

The Board's decision herein failed to discuss or analyze the evidence to support an 8(a)(4) finding, and the Trial Examiner's Decision (A. 234-235) relied to a great extent on the finding of anti-union motivation he deemed violative of 8(a)(3). The Board decision (A. 274-275) declined to assert jurisdiction on any violation other than 8(a)(4), and any facts supporting the discarded 8(a)(3) theory cannot be relied upon to support the present 8(a)(4) theory. Just because a company was anti-union, it would not follow that it was also "anti-Labor Board". There is absolutely no evidence in this record that the present Company harbored any unexpressed, unmanifested retaliatory attitude toward the Labor Board of the type that would have to be shown to make out a case on Petitioner's theory. In fact, the record shows, as the Trial Examiner found, that the Company had been advised (correctly) that the Board had no jurisdiction over the employer on the charges then pending. (A. 235, 236) It would be entirely inconsistent with that finding to also find that the Company would necessarily retaliate against its employees for meeting with a Board agent who had no authority over the Company. Under the substantial evidence rule, the Eighth Circuit was not required to give the Trial Examiner's findings "more weight than in reason and in the light of judicial experience they deserve." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496. The Eighth Circuit was required to take into account the evidence which fairly detracts from the Trial Examiner's findings. *Id.*, at page 488. Enforcement is properly denied, when, as in this record, it is shown that the Trial Examiner's findings are based upon mere speculation, conjecture, and surmise, instead of competent evidence.

The Board's Decision, in failing to analyze its own 8(a)(4) precedent discussed above, and other relevant precedent, and in failing entirely to review the evidence to see if an 8(a)(4) theory could be supported after discarding jurisdiction of the other claimed violations, clearly failed to afford the judicious type of review guaranteed to the Company under the Administrative Procedure Act. For this additional reason, it was appropriate for the Eighth Circuit to deny enforcement. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-169 (1962); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443 (1965); *Carnation Co. v. NLRB*, 429 F.2d 1130 (9th Cir. 1970); *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966); *NLRB v. WGOK*, 384 F.2d 500, 503 (5th Cir. 1967).

II. The Eighth Circuit Court's Decision Should Also Be Affirmed for the Other Reasons Urged by the Company That Enforcement of the Board's Decision Be Denied.

Although certiorari was not granted on these issues which were not reached by the Eighth Circuit, we mention these points because we believe they plainly call for affirmance of the Eighth Circuit's Decision. We deem it especially important to mention these points since the Petitioner's Brief, in conclusion, requests this Court to remand this case to the Eighth Circuit "with directions to enforce the Board's order." (Pet.Brief, p. 20) Such request is clearly inappropriate, in view of the following points which call for the Board's Decision to be denied enforcement:

1. The Board failed to show by substantial evidence upon the record as a whole that the Company's business was connected or related with Commerce as defined under Section 2(6) and (7) of the Act in any manner other than something of a *de minimis* nature. *NLRB v. Fainblatt*, 306 U.S. 601, 607 (1939); *Hiatt v. Schlect*, 400 F.2d 875 (9th Cir. 1968); *Weber v. Hiatt*, 424 F.2d 1366 (9th Cir. 1970), cert. den., 400 U.S. 879 (1970); *NLRB v. Idaho*

Maryland Mines Corp., 98 F.2d 129, 131 (9th Cir. 1938). The necessary showing was certainly not made by the double-hearsay, *ex parte* investigation, projections, and estimates made by Mr. Griffin on behalf of General Counsel. See facts at pages 6-8, *supra*. A substantial impact on commerce is not shown by the local purchase of 6 light bulbs, 2 pair of pliers, "some" couplings and conduit which may "assumptively" have been manufactured outside the State at some unknown point in time.

2. The present proceedings, involving 8(a)(4), were initiated by investigation conducted by a Board agent in violation of Section 10(b) of the Act which authorizes the Board to investigate a particular unfair labor practice only "whenever it is charged" that such violation has occurred. See facts at page 14, *supra*. "The Board cannot start a proceeding without such charge being filed with it." *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). "The Board should be an impartial administrator and must ascertain if there were unfair labor practices as charged." *NLRB v. Hopwood Retinning Co.*, 98 F.2d 97, 101 (2d Cir. 1938) (emphasis added). The Board's Decision herein (A. 274-275) establishes that there was no charge pending on May 1, 1968 (when the Board agent conducted the investigation now referred to, see p. 14 *supra*), of a type on which the Board could properly assert jurisdiction. The Board Decision itself establishes that the presently claimed violations of 8(a)(4), initiated by the Board agent's May 1 investigation, are of a completely different type than the original charges herein, which the Board has totally dismissed. Under such circumstances, where the Board "gets so completely outside of the situation which gave rise to the charge that it may be said to be initiating the proceeding on its own motion, then the complaint shall fall as not supported by the charge." *NLRB v. Kohler Co.*, 220 F.2d 3, 7 (7th Cir. 1955). The

charge of May 13 which is the entire basis for the present proceeding at this point was clearly initiated by the Board's investigation of May 1, and thus the present complaint should be dismissed as outside the Board's jurisdiction under Section 10(b). See also *Hercules Powder Co. v. NLRB*, 297 F.2d 424, 433 (5th Cir. 1961).

3. Section 14(c)(1)³⁰ of the Act granted the Board authority to erect jurisdictional standards to decline to assert jurisdiction over labor disputes involving any "class or category of employers" for the reasons which the Board's decision declines to assert jurisdiction with respect to Sections 8(a) (1), (3), and (5). Those same standards made it impossible for the Company to obtain protection from the illegal picketing of the Union which caused lack of sufficient employment to avoid the layoffs in question. See note 11, *supra*. The employer here involved had been declared by the published jurisdictional standards of the Board to be in a class "too small to protect." Now, the Board turns around and says he is not "too small to prosecute!" Such arbitrary, capricious, and discriminatory application of its jurisdictional standards so as to deprive Respondent from having access to Board process for his protection but at the same time to prosecute him all the way to the United States Supreme Court is a rather evident violation of 5 U.S.C. § 706 (2) (A), (B), (C), (D),³¹ and the due process clause of the Fifth Amendment of the United States Constitution. If the Board is permitted to depart from its jurisdictional standards here, to prosecute Respondent, but at the same time to preclude Respondent from access to Board processes for his own protection, this clearly violates the policy of the Act. *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). The Board

30. 29 U.S.C. § 164(c)(1).

31. It also violates Section 14(c)(1) of the Act for the Board to utilize its jurisdictional standards as a means of taking away substantive rights of small employers under the Act, but still prosecute them thereunder.

has not satisfactorily explained its discriminatory application of its jurisdictional standards here. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-169 (1962); *Carnation Co. v. NLRB*, 429 F.2d 1130 (9th Cir. 1970).

4. The theory of the Trial Examiner and Board on the violation now alleged is completely unsupported by substantial evidence on the record as a whole. See facts at pp. 8-14, *supra*. The conjecture and speculation of the Trial Examiner and his total refusal to consider the evidence favorable to the Company should be rejected. A rational analysis of the record shows that enforcement was properly denied in this case. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Aerovox Corp. of Myrtle Beach, S.C.*, 172 NLRB No. 97, 68 LRRM 1444, 1447 (1968); *Liberty Sportswear Co.*, 183 NLRB No. 127, 74 LRRM 1459, 1461, 1462 (1970); *Standard Electric Co. v. NLRB*, 387 F.2d 717 (5th Cir. 1968); *NLRB v. Selwyn Shoe Mfg. Co.*, 428 F.2d 217 (8th Cir. 1970).

CONCLUSION

The Decision of the United States Court of Appeals for the Eighth Circuit, 435 F.2d 1296, should be affirmed. It properly construed Section 8(a)(4) of the Act, and properly denied enforcement of the Board's Decision herein, for all of the reasons mentioned above.

Respectfully submitted,

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December 22, 1971

APPENDIX A

The following are excerpts from the statutes or rules referred to:

ADMINISTRATIVE PROCEDURE ACT, 60 Stat. 243, 80 Stat. 393, 5 U.S.C. § 706, provides in part:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall—
* * * (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

NATIONAL LABOR RELATIONS ACT, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151 et seq., provides in part:

"Sec. 2. When used in this Act— * * *

"(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other

Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

* * *

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint; * * *. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district court of the United States under the rules of civil

procedure for the district courts of the United States adopted by the Supreme Court of the United States
* * *

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *"

"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of Section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable

cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. * * * Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: * * *"

* * *

"Sec. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both."

* * *

"Sec. 14. (c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: * * *"

**RULES AND REGULATIONS OF NATIONAL
LABOR RELATIONS BOARD, 29 C.F.R., provides in part:**

"Sec. 102.9 *Who may file; withdrawal and dismissal.*
—A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. * * * Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the trial examiner designated to conduct the hearing, or the Board."

* * *

"Sec. 102.15 *When and by whom issued; contents; service.*—After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (1) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (2) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed."

* * *

"Sec. 102.30 *Examination of witnesses; depositions.*—Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition."

STATEMENTS OF PROCEDURE published by the Board include the following:

"Sec. 101.2 Initiation of unfair labor practice cases.— The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. The charge is filed with the regional director for the region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the regional office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices."

* * *

*"Sec. 101.4 Investigation of charges.—*When the charge is received in the regional office it is filed, docketed, and assigned a case number. * * * As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned for investigation to a member of the field staff, who interviews representatives of the parties and other persons who have knowledge as to the charges, as is deemed necessary. * * * The regional director may in his discretion dispense with any portion of the investigation described in this section as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. * * *

* * *

Section 101.10 Hearings:—(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the region where the charge originated. A duly designated trial examiner presides over the hearing. The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the general counsel, all parties to the proceeding, and the trial examiner have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. * * *

Opinion of the Court

**NATIONAL LABOR RELATIONS BOARD v.
SCRIVENER, DBA AA ELECTRIC CO.**

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.**

No. 70-267. Argued January 12, 1972—Decided February 23, 1972

Employer's discharge of employees because they gave written sworn statements to a National Labor Relations Board field examiner investigating an unfair labor practice charge filed against the employer, but who had neither filed the charge nor testified at a formal hearing on the charge, constituted a violation of § 8 (a) (4) of the National Labor Relations Act. Pp. 121-125.

435 F. 2d 1296, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

William Terry Bray argued the cause for petitioner. With him on the brief were *Solicitor General Griswold*, *Peter G. Nash*, *Norton J. Come*, and *Paul J. Spielberg*.

Donald W. Jones argued the cause and filed a brief for respondent.

William B. Barton and *Harry J. Lambeth* filed a brief for Associated Builders & Contractors, Inc., as *amicus curiae*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Section 8 of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. § 158, provides:

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

Section 7 of the Act, as amended, 61 Stat. 140, 29 U. S. C. § 157, provides:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

This case presents the issue whether an employer's retaliatory discharge of an employee who gave a written sworn statement to a National Labor Relations Board field examiner investigating an unfair labor practice charge filed against the employer, but who had not filed the charge or testified at a formal hearing on it, constitutes a violation of § 8 (a)(1) or of § 8 (a)(4) of the Act. The Board, with one member not participating, unanimously held that it was. 177 N. L. R. B. 504 (1969). The United States Court of Appeals for the Eighth Circuit, by a unanimous panel vote, held otherwise and denied enforcement. 435 F. 2d 1296 (1971). The Court of Appeals did not reach other issues raised by the employer. We granted certiorari in order to review a decision that appeared to have an important impact upon the administration of the Act. 404 U. S. 821 (1971).

I

There is testimony in the record, credited by the trial examiner and adopted by the Board, to the following effect:

The respondent Robert Scrivener is a small electrical contractor in Springfield, Missouri. He does business as

an individual proprietor under the name of AA Electric Company. On March 18, 1968, five of Scrivener's six employees signed cards authorizing a union¹ to represent them in collective bargaining. The next day business agent Moore advised Mr. Scrivener of the union's majority status and asked to negotiate a contract. Scrivener examined the cards, but refused the request.

Mr. Scrivener then visited his jobsites and complained to his employees about their action. On March 20 he dismissed card-signers Cockrum, Smith, and Wilson, and hired Hunt, a journeyman, and Statton, a helper. Hunt had worked for Scrivener on prior occasions.

On March 21 the union filed charges with the Board alleging that the company had violated §§ 8 (a)(1), (3), and (5) of the Act. On March 26 the three discharges returned to work. The next day, however, Cockrum and Smith again were released on the ground that there was a lack of work. The two new employees and Perryman, the sole nonsigner among the six original employees, were retained. Smith was again recalled on April 1 and, with the other card-signers, except Cockrum, continued to work until April 18.

On April 17 a field examiner from the Board's regional office met with Mr. Scrivener and discussed the charges that had been filed. That evening the examiner interviewed the five card-signers at the union hall. He took affidavits or sworn statements from all except Cockrum who was not then working for Scrivener. On April 18 Scrivener inquired of at least two of the men whether they had met and been interviewed by the examiner the evening before. At the end of the day Scrivener dismissed the four who had given the statements; he did so with the explanation that he had no work for them to do.

¹ Local 453, International Brotherhood of Electrical Workers, AFL-CIO.

Perryman, Hunt, and Statton continued to work on the three houses and the 11-unit apartment building the company had under construction at the time.

On May 13 the union filed an amended charge adding the allegation that the dismissal of the four men on April 18 was because they had given the statements to the examiner in connection with the earlier charge, and that this was a violation of § 8 (a)(1) and § 8 (a)(4). Three of the men returned to work in May or early June. The fourth was never recalled.

A complaint was issued on both the original charge and the added allegation.

II

The Board, in agreement with the trial examiner, concluded that the April 18 dismissal of the four employees was "in retaliation against them for having met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against" Scrivener; that "[t]he investigation of charges filed is an integral and essential stage of Board proceedings"; and that this conduct violated § 8 (a)(1) and § 8 (a)(4). 177 N. L. R. B., at 504. The customary order to cease and desist, to reinstate the four employees with back pay, and to post notices was issued. The Board concluded, however, in disagreement with the trial examiner and with one member dissenting, "that it will not effectuate the policies of the Act for the Board to assert jurisdiction herein over the alleged independent and unrelated violations of Section 8 (a)(1), (3), and (5) of the Act," and dismissed those portions of the complaint. *Id.*, at 504, 505.

The Court of Appeals, *per curiam*, relying on its earlier decision in *NLRB v. Ritchie Mfg. Co.*, 354 F. 2d 90 (CA8 1965), held that § 8 (a)(4) does not "encompass discharge of employees for giving written sworn statements to Board field examiners." In *Ritchie* the court had

stated, "We are reluctant to hold that § 8 (a)(4) can be extended to cover preliminary preparations for giving testimony." 354 F. 2d, at 101.² In the present case, the court refused to uphold the Board's finding that the challenged discharges violated § 8 (a)(1) as well as § 8 (a)(4) since "[t]o do so would be to overrule *Ritchie* implicitly, and we are not prepared to take that action." 435 F. 2d, at 1297.

III

The view of the Court of Appeals is that § 8 (a)(4) of the Act serves to protect an employee against an employer's reprisal only for *filing* an unfair labor practice charge or for giving *testimony* at a formal hearing, and that it affords him no protection for otherwise participating in the investigative stage or, in particular, for giving an affidavit or sworn statement to the investigating field examiner.

We disagree for several reasons.

1. Construing § 8 (a)(4) to protect the employee during the investigative stage as well as in connection with the filing of a formal charge or the giving of formal testimony comports with the objective of that section. Mr. Justice Black, in no uncertain terms, spelled out the congressional purpose:

"Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of § 8 (a)(4) which makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges. And it has been held that it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file

² Apparently all the *Ritchie* employee did was "to prepare to testify." 354 F. 2d, at 101.

charges" (citations omitted). *Nash v. Florida Industrial Comm'n*, 389 U. S. 235, 238 (1967).

This complete freedom is necessary, it has been said, "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mut. Life Ins. Co. v. NLRB*, 89 U. S. App. D. C. 261, 263, 191 F. 2d 483, 485 (1951). It is also consistent with the fact that the Board does not initiate its own proceedings; implementation is dependent "upon the initiative of individual persons." *Nash v. Florida Industrial Comm'n*, *supra*, 389 U. S., at 238; *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U. S. 418, 424 (1968).

2. The Act's reference in § 8(a)(4) to an employee who "has filed charges or given testimony," could be read strictly and confined in its reach to formal charges and formal testimony. It can also be read more broadly. On textual analysis alone, the presence of the preceding words "to discharge or otherwise discriminate" reveals, we think, particularly by the word "otherwise," an intent on the part of Congress to afford broad rather than narrow protection to the employee. This would be consistent with § 8(a)(4)'s purpose and objective hereinabove described. A similar question with respect to the word "evidence" in § 11(1) and (2) of the Act, 29 U. S. C. § 161(1) and (2), was considered in *NLRB v. Wyman-Gordon Co.*, 394 U. S. 759, 768-769 (1969), and was resolved by a broad and not a narrow construction.³ That precedent is pertinent here.

3. This broad interpretation of § 8(a)(4) accords with the Labor Board's view entertained for more than 35 years. Section 8(a)(4) had its origin in the Na-

³ The three Justices who concurred in the result joined Part III of the plurality opinion. 394 U. S., at 769.

tional Industrial Recovery Act, 48 Stat. 195. Executive Order No. 6711, issued May 15, 1934, under that Act (10 NRA Codes of Fair Competition 949), provided, "No employer . . . shall dismiss or demote any employee for making a complaint or giving evidence with respect to an alleged violation" The first Labor Board interpreted that phrase to protect the employee not only as to formal testimony, but also as to the giving of information relating to violations of the NIRA. *New York Rapid Transit Corp.*, 1 N. L. R. B. Dec. 192 (1934) (affidavits); *Ralph A. Freundlich, Inc.*, 2 N. L. R. B. Dec. 147, 148 (1935) (state court testimony). In § 8 (a) (4) the word "testimony," rather than "evidence," appears. But the new language was described as "merely a reiteration" of the Executive Order language and it was stated that the "need for this provision is attested" by the above-cited Board decisions. Comparison of S. 2926 (73d Cong.) and S. 1958 (74th Cong.), Senate Committee Print 29, 1 Leg. Hist. of National Labor Relations Act 1319, 1355 (1949).⁴

4. This interpretation, in our view, also squares with the practicalities of appropriate agency action. An employee who participates in a Board investigation may not be called formally to testify or may be discharged before any hearing at which he could testify. His contribution might be merely cumulative or the case may be settled or dismissed before hearing. Which em-

⁴ We do not regard three Board cases, *Albert J. Bartson*, 23 N. L. R. B. 666, 673-674 (1940); *F. W. Poe Mfg. Co.*, 27 N. L. R. B. 1257, 1270 (1940); and *The Kramer Co.*, 29 N. L. R. B. 921, 935 (1941), cited by the *amicus*, as indicative of a contrary Board interpretation. In each of those cases the employee had filed a charge. The Board's reference, in each opinion, to that fact and its further reference, in the last two cases, to the "express statutory protection afforded employees" by § 8 (a) (4), are expected and natural references and do not, in our view, indicate a narrow approach to the statute.

employees receive statutory protection, should not turn on the vagaries of the selection process or on other events that have no relation to the need for protection. It would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time. This would be unequal and inconsistent protection and is not the protection needed to preserve the integrity of the Board process in its entirety.^{*}

5. The Board's subpoena power also supports this interpretation. Section 11 of the Act, 29 U. S. C. § 161, gives the Board this power for "the purpose of all hearings and investigations." Once an employee has been subpoenaed he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified. Judge Lumbard pertinently described it:

"It is, we think, a permissible inference that Congress intended the protection to be as broad as the [subpoena] power." *Pedersen v. NLRB*, 234 F. 2d 417, 420 (CA2 1956).

Under this reasoning, if employees of Scrivener had been subpoenaed, they would have been protected. There is no basis for denying similar protection to the voluntary participant.

6. The approach to § 8 (a) (4) generally has been a liberal one in order fully to effectuate the section's remedial purpose. In *M & S Steel Co. v. NLRB*, 353 F. 2d 80 (CA5 1965), the court sustained the Board's

^{*} We are not persuaded that the reach of § 8 (a) (3), 29 U. S. C. § 158 (a) (3), and the criminal penalty provided by § 12, 29 U. S. C. § 162, provide the required protection that justifies a narrow reading of § 8 (a) (4).

finding, 148 N. L. R. B. 789, 792-795 (1964), that § 8 (a) (4) was violated by the discharge of an employee, Williams, because he gave a statement to a field examiner. In *NLRB v. Dal-Tex Optical Co.*, 310 F. 2d 58, 60-61 (CA5 1962), the court sustained the Board, 131 N. L. R. B. 715, 721 (1961), in affording protection to an employee, Whitaker, who appeared but did not testify at a Board hearing. See *John Hancock Mut. Life Ins. Co. v. NLRB*, *supra*, and *NLRB v. Syracuse Stamping Co.*, 208 F. 2d 77, 79-80 (CA2 1953).*

We are aware of no substantial countervailing considerations. We therefore conclude that an employer's discharge of an employee because the employee gave a written sworn statement to a Board field examiner investigating an unfair labor practice charge filed against the employer constitutes a violation of § 8 (a) (4) of the National Labor Relations Act.

Having reached this conclusion, it is unnecessary for us to determine whether the employer's action is also a violation of § 8 (a) (1), and we expressly refrain from so doing.

IV

A final comment about the jurisdictional aspects of the case is perhaps in order. The Board found that Scrivener's operations were too small to satisfy the Board's self-imposed and published \$50,000 outflow-inflow jurisdictional standard for non-retail enterprises. See *Siemons Mailing Service*, 122 N. L. R. B. 81, 85 (1958). It also found, however, that Scrivener's operations were sufficient to "have an impact on and affect interstate commerce," 177 N. L. R. B., at 504, and thus were within the Board's statutory jurisdiction as defined by § 10 (a) of the Act, 29 U. S. C. § 160 (a).

* But cf. *Hoover Design Corp. v. NLRB*, 402 F. 2d 987 (CA6 1968) (employee who "threatened to go to the Board" or file charges).

This prompted the Board to assert jurisdiction over the §§ 8 (a)(1) and (4) claim of retaliation, but to refuse to exercise jurisdiction over the original §§ 8 (a)(1), (3), and (5) claims on the ground that the latter would have "no immediate impact on the vindication of the right of an individual to resort to the Board's processes" 177 N. L. R. B., at 505. Scrivener, as a consequence, complains that relief for him against a claimed unfair labor practice on the part of the union is unavailable.

The employer's complaint of jurisdictional unfairness is understandable. See, however, *Pedersen v. NLRB*, *supra*, 234 F. 2d 417. As we read the opinion of the Court of Appeals, this issue and that of the sufficiency of the evidence, and perhaps others, were not reached when that court decided the § 8 (a)(4) issue as it did. We note that that court described the Board's jurisdiction to act as "marginal." 435 F. 2d, at 1296. In any event, this and any other issues may be canvassed on remand.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings.

It is so ordered.

